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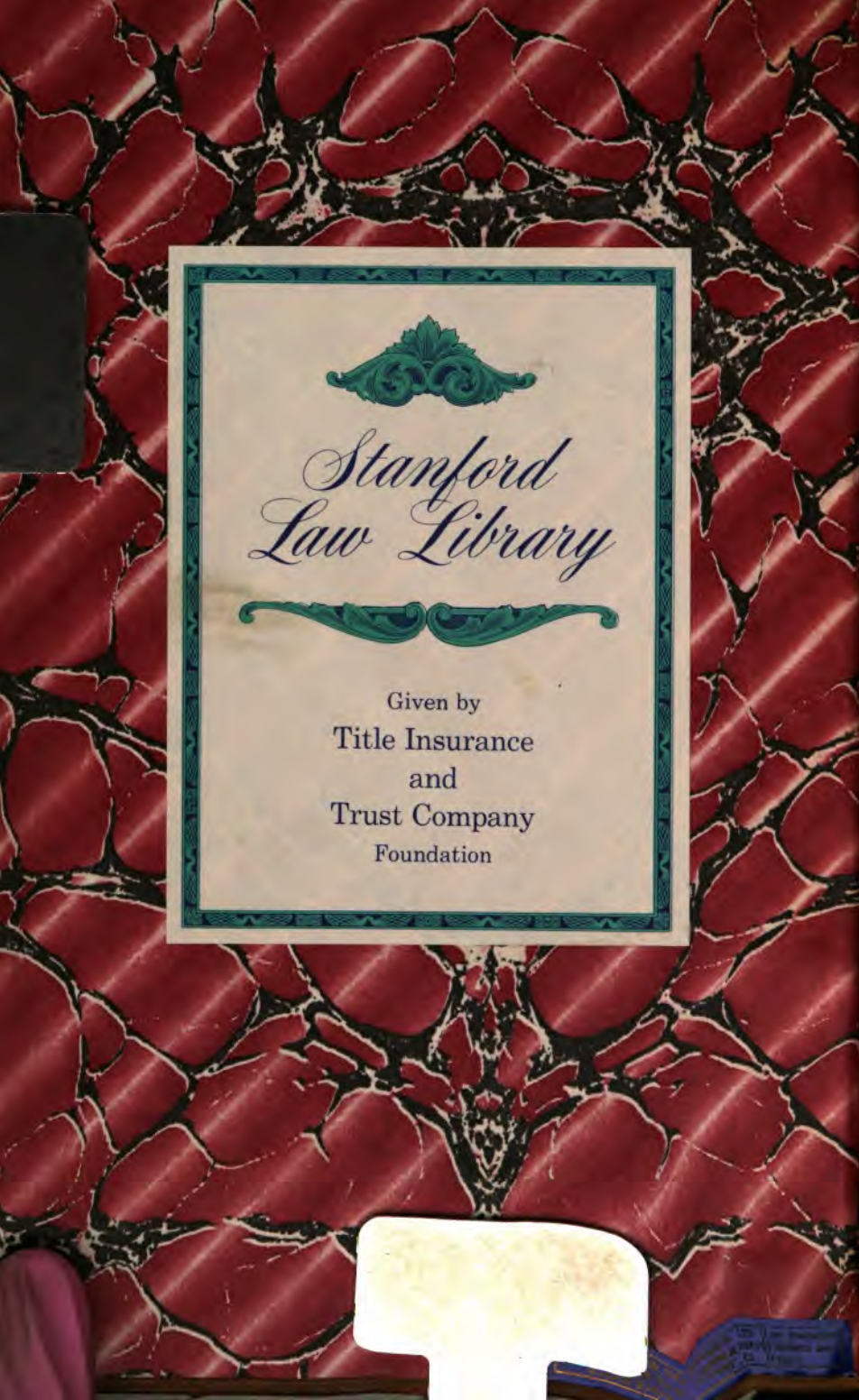
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THE LAW

OF

VENDORS AND PURCHASERS.

A

PRACTICAL TREATISE

OF

The Law

OF

VENDORS AND PURCHASERS

OF

ESTATES.

By EDWARD BURTENSHAW SUGDEN, Esq.

OF LINCOLN'S-INN.

BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.

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ADVERTISEMENT.

THROUGHOUT the following Treatise, it has been the author's endeavour to state the Law in as concise a manner as accuracy would permit. Brevity seemed to be peculiarly called for in a work professedly written with a view to practical utility.

The Profession will perceive that the greater part of the subject has not been hitherto treated on. In regard to those parts in the elucidation of which the talents of other gentlemen have already been applied, it has been the author's constant practice not to resort to the works of those gentlemen, until he had gone through all the Cases he could meet with on the subject, and had finally arranged

ranged the materials he had collected in his own method. This plan was adopted for two reasons, first, in the hope that a new arrangement might throw some additional light upon the subject; and, secondly, because it seems hardly justifiable for one author to appropriate to himself the labours of another. Where any author has been quoted, the credit of the passage is secured to him by the mode of quotation adopted.

Much pains have been bestowed on the Indexes, through a conviction that a work which is in want of a correct index, either to the names of the Cases cited or to the principal subjects treated on, cannot be essentially useful in practice.

In a few instances, the author has been tempted to digress; but this does not interfere with the body of the work, and the

the importance of the subjects will, it is hoped, be a sufficient excuse for their introduction.

Were the author to state how little advantage he has derived from the assistance of others, and under what peculiar disadvantages the work has been written, it might, perhaps, in some measure, plead his excuse for any errors into which he may have fallen; but as the merit of the work only can ultimately ensure its success, on that he must rely, trusting to the indulgence of a liberal profession, who will be impressed with a due sense of the difficulty attending a minute investigation of so wide a field of legal learning.

In page 255 it is stated, that some gentlemen appear to think that a purchaser

chaser is in no case bound to see to the application of the purchase-money, where there is a hand appointed to receive the money. It was not till after the whole of the work had been printed, that the author saw the *last* edition of Mr. Powell's treatise of Mortgages, where the same opinion is espoused. The author has not been induced to alter his sentiments, but he has deemed it proper to call the reader's attention to the discussion which this important point has undergone (*a*).

The

(*a*) The author has searched the register's book for the three cases of Langley v. Lord Oxford, Tenant v. Jackson, and Cotton v. Everall, cited in 1 Bro. C. C. 186, n. The first case he found in Reg. Lib. 1748, B. 300, but the register's book merely contains an account of the dismissal of the plaintiff's bill, without a statement of the facts. The second case he discovered in Reg. Lib. 1773,

The 2d part of Mr. Vesey's 1st vol. N.S. is just published, and the author begs to refer the reader to the case of Trimmer v. Bayne, page 209, in which the Master of the Rolls, on the general doctrine of marshalling, extended the benefit of a vendor's lien on an estate for the purchase-money, to third persons. It will be seen that a different rule is stated in the following work (p. 283—286). The author may be allowed to observe that in Trim-

---

1773, B. 120, 481. The facts are very complicated, and the author did not meet with the decree. The third case he searched for through some books, without success. The very heavy expense attending a search of the register's books, by a gentleman under the bar, and the strict rule of permitting none but office copies to be had of the reports, must, in many instances, deter gentlemen from resorting to those funds of knowledge, and consequently operate as a bar to the propagation of legal learning.

mer

mer v. Bayne, the case of Coppin v. Coppin, was not adverted to, although it appears to be a direct authority against the decision of the Master of the Rolls.

Stone Building, Lincoln's Inn,
16th February, 1808.

THE

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THE

THE LAW
OF
VENDORS AND PURCHASERS
OF
ESTATES.

INTRODUCTORY CHAPTER.

MORAL writers insist (*a*), that a vendor is bound, *in foro conscientiæ*, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force, have, however, been advanced in favour of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality (*b*).

If a person enter into a contract, with full knowledge of all defects in the estate, no question can arise: *scientia enim utrinque par pares facit contrahentes* (*c*).

(*a*) Cic. de Off. 3. 13. Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9. Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 2. Puffendorf de Off. l. 1. c. 15. s. 3. Valerius Maximus, l. 8. c. 11. et vide Deuteron. xxv. 14.

(*b*) Vide *infra*, ch. 6.

(*c*) Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9. 3. Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 5.

So,

So, if at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems, that the purchaser must take the estate with all its faults; and cannot claim any abatement, or compensation, in respect of them.

And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was aware of them, and did not disclose them to the purchaser; yet if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor.

The disclosure even of *patent* defects in the subject of a contract, may be allowed to be a moral duty; but it is, what the civilians term, a duty of imperfect obligation. *Vigilantibus, non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

In this respect, equity follows the law. But it has been decided, that if a vendor, during the treaty, industriously conceal a *patent* defect, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sustain an action against the purchaser for breach of contract.

And if a vendor know of a *latent* defect in his estate, which the purchaser could not, by any attention

attention whatever, possibly discover, he is bound to disclose it, notwithstanding the estate be sold, expressly subject to all its faults (1).

By the civil law, vendors were bound to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent, however, the inconveniences which would inevitably result from this general doctrine, it was qualified by holding, that if the defects of the subject of the contract were evident, or the buyer might have known them by proper precaution, he could not obtain any relief against the vendor.

The rule of the civil law also was, "*simplex commendatio non obligat.*" If, as Domat remarks, the seller merely made use of those expressions, which are usual to sellers, who praise at random their goods, which they have a mind to sell; the buyer, who ought not to have taken his measures upon expressions of that kind, can-

(1) But note, a purchaser is not bound to acquaint the vendor with any *latent* advantage in the estate: as for instance, if he knows there is a mine on the estate, of which he is conscious the vendor is ignorant, he is not bound to disclose that circumstance to the vendor. See 2 Bro. C. C. 420.

not procure the sale to be dissolved upon any such pretext (*d*).

The same rule prevails in our law (*e*), and has received a very lax construction. It has been decided, that no relief lies against a vendor for having falsely affirmed, that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase it (*f*).

Neither can a purchaser obtain any relief against a vendor for false affirmation of value (*g*); because value consists in judgment, and estimation, in which many men differ (*h*).

But a remedy will lie against a vendor, for false affirmation of rent (2), if the purchaser depending on the statement do not enquire further.

And

(*d*) 1 Dom. 85.

(*e*) Chandelor v. Lopus, Cro. Jac. 4.

(*f*) 1 Rob. Abr. 101. pl. 16. See Kinaird v. Lord Dean, stated *infra*, n.

(*g*) Harvey v. Young, Yelv. 20.

(*h*) See Ekins v. Tresham, 1 Lev. 102.

(2) Ekins v. Tresham, *ubi sup.* Lysney v. Selby, 2 Lord Raym. 1118. In the 1st vol. of Coll. of Decis. p. 332, the following case is reported:—An heritor having solemnly affirmed to his tacksman, at setting the lands, that there was paid by the preceding tenants, for each acre, a great dea more than really was paid, and thereby induced him to take it

And if a vendor affirm, that the estate was valued by persons of judgment, at a greater price than it actually was; and the purchaser act upon such misrepresentation, the vendor cannot compel execution of the contract (*i*).

The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself.

Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the title-deeds; as he is otherwise guilty of a direct fraud, which the pur-

(*i*) Buxton v. Cooper, 3 Atk. 383. See Knox v. Simmonds, 3 Bro. C. C. 358.

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it at a very exorbitant rate, whereby he was lesed *ultra dimidium*; yet continued to possess two years before he complained. The lords found the alledgeance of circumvention and fraud, both *in consilio* and *in eventu*, not sufficient to reduce the tack, *and that the tenant should have informed himself better what was the true rent, and not have relied on the setter's assertion, and ought to have tried the quality of the ground, and his eye being his merchant, he had none to blame but himself*, especially now that he had acquiesced two years. Kinaird v. Lord Dean. And see Cockburn v. Creditors of Cockpen, ibid. 2 vol. 312.

chaser, however vigilant, has no means of discovering: and Lord Hardwicke laid it down (*k*), that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in equity (*l*): to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor.

The same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can, however, seldom happen, that the attorney or agent of the purchaser, is conusant of any incumbrance on the estate intended to be purchased, unless he be employed by both vendor and purchaser; which the same person frequently is, in order to save expense. This practice has often been discountenanced by the courts (*m*), and is frequently productive of the most

(*k*) Per Lord Hardwicke, 1 Ves. 96. and see 6 Ves. Jun. 193.

(*l*) It seems clear that relief might now be obtained at law.

(*m*) See 6 Ves. Jun. 631.

serious

serious consequences; for it not rarely happens, that there are incumbrances on an estate which can only be sustained in equity, and which will not bind a purchaser who obtains the legal estate; unless he had notice of them previously to completing his purchase. Now notice (*n*) to an agent, although one concerned for both parties, is treated in equity, as notice to the purchaser himself; and, therefore, if the attorney know of any equitable incumbrance, the purchaser will be bound by it, although he himself was not aware of its existence.

And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and no incumbrance appear; yet if the attorney know of any incumbrance, equity (although the instrument by which the incumbrance was created, be not registered, and therefore void at law) will assist the incumbrancer in establishing his demand against the purchaser (*o*).

Another substantial reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purcha-

(*n*) See *infra*, ch. 16. (*o*) See *infra*, ch. 15. 16.

ser, although it be proved that he was innocent, will be answerable for the misconduct of his agent. In one case (*p*) a purchaser lost an estate, for which he gave nearly 8000*l.* merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase-money.

On the other hand, the same person being employed on both sides, may be detrimental to the vendor; for if the security given be not good, the circumstance of only one person being employed, may be deemed fraudulent, and in that case equity will relieve the purchaser (*q*).

With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to which his covenants do not extend; and therefore, if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he appears to be without a remedy (*r*).

To sum up the foregoing observations, a purchaser will be entitled to relief, on account of any *latent* defects in the estate, or the title to the es-

(*p*) Doe v. Martin, 4 Term Rep. 39.

(*q*) See Sir Jennings Clerke, v. Smith, 2 Bro. C. C. 409. cited.

(*r*) See *post.* ch. 9.

tate,

tate, which were not disclosed to him, and of which the vendor, or his agent, was aware.

In addition to this protection afforded him by the law, a provident purchaser will examine and ascertain the quality and value of the estate, and not trust to the description and representation of the vendor, or his agents; he will employ an agent and attorney, not concerned for the vendor; and will have the title to the estate inspected by counsel (3).

With respect to incumbrances, we may further remark, that if a purchaser suspect any person has an incumbrance on the estate he has contracted to buy, he should, before proper witnesses, enquire the fact of him, *at the same time stating, that he intends to purchase the estate*; and if such person

(3) This can seldom be effectually done, unless the attorney carefully compare the abstract with the title-deeds: in doing which, his attention should be particularly directed to the descriptions of the parties, the recitals, the parcels, and the covenants for quiet enjoyment, free from incumbrances; which frequently lead to incumbrances and facts which have been suppressed. This should be particularly attended to, as a purchaser is bound by every deed or fact, to which an instrument in his possession leads, by recital or description. See *post.* ch. 16.

has

has an incumbrance on the estate, and deny it, equity would relieve the purchaser (*s*).

Where difficulties arise in making out a good title, the purchaser should not take possession of the estate, until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion, as such a measure would, in most cases, be deemed an acceptance of the title (*t*).

A purchaser may, however, safely take possession of the estate, at the time the contract is entered into, as he cannot be held to have waved objections, of which he was not aware; and if the purchase cannot be completed on account of objections to the title, he will not be bound to pay any rent, unless the occupation has been beneficial to him (*u*).

It is very usual for auctioneers to prepare the particulars and conditions of sale; but this a vendor should never permit, as continual disputes arise

(*s*) Ibbetson v. Rhodes, 2 Vern. 554. and see Amy's case, 2 Cha. Ca. 128. cited.

(*t*) See 3 P. Wms. 193. and Calcraft v. Roebuck, 1 Ves. Jun. 226.

(*u*) Hearn v. Tomlin, Peake's Ca. 192.

from

from their ignorance of the title to the estate, and their consequent mistatements.

Where an estate, intended to be sold, has been for a *long* time in a family, or the title has not been recently investigated, it might be advisable for the vendor to have an abstract of his title submitted to counsel, and the objections to it, if there should be any, cleared up, previously to any contract being entered into for sale of the estate.

By these means, no delay will arise on the part of the vendor, which might impede the sale from being carried into effect by the time stipulated; and the vendor will, in many cases, be preserved the expense necessarily attending tedious discussions of his title.

Another advantage of this measure is, that if there should be any defect in the title which cannot be cured, it would only be known to the agents and counsel of the vendor, which is of the utmost importance; for it frequently happens, that a defect in a title, by being discovered to persons not concerned for the vendor, comes to the knowledge of the person interested in taking advantage of it, by which many titles have been disturbed.

CHAPTER I.

OF SALES BY AUCTION AND PRIVATE CONTRACT.

By two Acts of his present Majesty's reign (*a*), a duty is imposed of 6*d.* in the pound on the purchase-money of estates sold by auction.

But sales by auction of estates, under the decree of the Court of Chancery, or Exchequer, in England; or of the Courts of Great Sessions in Wales; or of the Court of Session, or Exchequer, in Scotland (*b*), are not liable to the duty: nor do the Acts extend to auctions for granting copyhold or customary lands, for lives or years (*c*); to the sale of any estate under a sheriff's authority, for the benefit of creditors; or to the sale of any bankrupt's estate, sold by order of the assignees, under any commission of bankrupt (*d*); but this last exception does not extend to a bankrupt's estate sold under Lord Rosslyn's order (*e*) for the benefit

(*a*) 27 Geo. III. c. 13. s. 36. and 37 Geo. III. c. 14.
(*b*) 19 Geo. III. c. 56, s. 13.
(*c*) Id. s. 14.
(*d*) Id. s. 15.
(*e*) 4 Bro. C. C. at the end.

of

of a mortgagee (*f*). And lastly, no auction duty is payable in respect of monies produced by sale of estates, sold by auction, for the redemption of land tax (*g*).

The auctioneer, agent, or seller by commission, is bound to pay the duty, which he may deduct out of the money he receives at the sale. If he receive none, he may recover it from the vendor by action.

But if the owner of estates sold by auction, or any other person on his behalf, buy in the same without fraud or collusion, no auction duty will become payable (*h*); provided notice be given in writing (*i*) to the auctioneer before such bidding both by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for his use (*k*); and provided the delivery of such notice be verified by the oath of the auctioneer, as to the fairness and reality of the transaction to the best of his knowledge.

Neither will the duty be payable if the estate is

(*f*) Coare v. Creed, 2 Esp. Ca. 699.

(*g*) 42 Geo. III. c. 116. s. 113.

(*h*) 19 Geo. III. c. 56. s. 12.

(*i*) 28 Geo. III. c. 37. s. 20.

(*k*) See a form of such notice, Appendix, No. 1.

bought

bought in by, or by the order of, the agent (*l*) of the vendor; but notice in writing of his intention must be given by the agent, if he himself bid, or by him and the bidder, if he appoint a person to bid (*m*); and the delivery of such notice must be verified in the same manner as the delivery of a notice given by the owner.

The owner of an estate intended to be sold by auction, who means to buy it in if a particular price be not bid for it, should by no means neglect to give the notices required by the Acts; because, if the estate be bought in, and the proper notices were not given, he will have no equity to entitle him to an allowance of the auction duty, however fair the transaction may be; but the sale will be held real, and the duty must be paid (*n*).

Any thing in the nature of a bidding is within the Acts; and therefore where the owner put the price under a candlestick in the room, and it was agreed that no bidding should avail if not equal to that (which is called a dumb bidding), it was holden (*o*) to be a bidding within the Acts.

(*l*) 42 Geo. III. c. 93. s. 1.

(*m*) See forms of such notices, Appendix, Nos. 2 and 3.

(*n*) See Christie's case, cited 3 Ves. Jun. 625. N.

(*o*) See the case, cited in Cruso v. Crisp, 3 East, 337.

But

But in the case of Cruso v. Crisp (*p*), it was decided, that *putting up* an estate in lots at certain prices, and *no person* bidding for the same, was not a bidding within the Acts; and therefore no previous notice is in such case necessary.

This case would, perhaps, have received the same determination, had there even been any biddings on the sums at which the estate was put up; but this is at least doubtful, and therefore proper notices should be given, although it may be intended only to put up the estate at a certain price, and not to bid for it.

According to Cicero (*q*), a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a person to depreciate the value of an estate intended to be sold.

Huber lays it down (*r*), that if a vendor employ a puffer, he shall be compelled to sell the estate to the highest *bona fide* bidder; because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer.

In Bexwell v. Christie (*s*), Lord Mansfield and the other Judges of B. R. followed the rule of the civil law, and treated a *private* bidding, by or on

(*p*) *Ubi sup.*
(*q*) De Off. 3, 15.
(*r*) Prælectiones, 18. 2. 7.
(*s*) Cowp. 395.

the

the behalf of the vendor, as a fraud; but the legislature, by the statutes imposing a duty on sales of estates by auction, seems to have been of a different opinion, and even to have sanctioned it. As my Lord Rosslyn, who was present at the making of the Act, remarked in the case of Conolly v. Parsons(*t*), the Acts of Parliament go upon its being a usual thing and a fair thing for the owner to bid. The pressure, when the tax was imposed, was by embarrassing people who chose to dispose of their goods by auction, if they chose to be purchasers, by the tax falling upon them. His Lordship added, that he thought it would have occurred either to Lord Thurlow or to him, when the exception in favour of the owner was proposed, that the case would not exist, as the owner could not be a bidder; or that, for his attempting to do what he could not by law, it would be just that he should pay the duty. It was very wrong to the public to let that clause stand, if at the time it was understood that the owner bidding was doing an illegal thing. The Acts do not require an open notice, but only a private notice to the auctioneer, and an oath to prevent the setting up a bidding for the owner, that the bidder might evade paying the duty.

(*t*) See 3 Ves. Jun. 628.

Notwith-

Notwithstanding, however, the opinion of the legislature, Lord Kenyon, in the subsequent case of Howard v. Castle (*u*), clearly coincided with Lord Mansfield's opinion; and held, that unless it was publicly known that the owner intended to bid, it was a fraud upon the purchaser, and consequently no action would lie against him for non-performance of his agreement.

But in the case of Conolly v. Parsons (*x*), Lord Rosslyn said, the reasoning in the foregoing case went large certainly; and did not at all convince him. He said he should wish it to undergo a reconsideration; for if it was law, it would reduce every thing to a Dutch auction, by bidding downwards. He felt vast difficulty to compass the reasoning, that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the biddings of others. The case of Conolly v. Parsons was compromised, and consequently his lordship did not give judgment; but it seems he was clearly of opinion, that public notice of a bidding, by or on the behalf of a vendor, was not necessary.

And in the later case of Bramley v. Alt (*y*), where

(*u*) 6 Term Rep. 642.
(*x*) 3 Ves. Jun. 625, N.
(*y*) Bramley v. Alt. 3 Ves. Jun. 620.

an estate was put up to sale by public auction, and an agent for the vendor bid to 75*l.* an acre, without public notice of his intention to do so; and after a contest with real bidders, the estate was bought at 101*l.* 17*s.* an acre; a specific performance was decreed with costs.

In this case, Lord Alvanley, then Master of the Rolls, considered the case of Howard v. Castle only as a decision, that where all the bidders except the purchaser are puffers, the sale shall be void (z).

The case of Conolly v. Parsons was, I understand (although it does not appear in the report), exactly similar to the case of Bramley v. Alt; for there was a contest between real bidders, after the person employed to bid on the part of the vendors had desisted from bidding.

Upon the whole, it appears to be settled, that public notice of the owner's intention to bid is not essential to the validity of a sale, if there be a contest between real bidders, after the biddings on the part of the owner have ceased. And it is conceived, that if there were real bidders at a sale, it would be supported, although the bidding immediately preceding that of the purchaser was fictitious.

(z) And see 3 Ves. Jun. 627.

Where

Where public notice has been given, the sale will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other (*a*).

If the particulars or advertisements state (as is frequently the case), that the estate is to be sold *without reserve*, it seems clear that the sale would be void against a purchaser, if any person were employed as a puffer, and actually bid at the sale.

It is generally understood, that some person will bid on the part of the owner; and it therefore seems to deserve consideration, whether it would not, in most cases, be advisable to give public notice of the owner's intention, previously to the sale; which would effectually prevent it being called in question, on the ground of fraud.

Where public notice is given, the mode least liable to objection seems to be that of reserving a bidding (*b*). It may here, however, be proper to remind vendors, that buying in an estate, especially where it is done without public notice, mostly prejudices a future sale. This was exemplified in the

(*a*) Oldfield v. Round, 5 Ves. Jun. 508; and see Twining v. Morris, 2 Bro. C. C. 326.

(*b*) See Bexwell v. Christie, Cowp. 395.

sale of an estate before one of the Masters in Chancery, where 23,000*l.* was *bona fide* bid, and the estate was bought in by the agent of the vendor; afterwards there were three other sales in the Master's office; and the consequence of the estate having been bought in, deterring others from bidding, was, that on the two first occasions no more was offered than 12,000*l.* and 6,000*l.*; and the estate finally sold for 15,000*l.* (*c*).

If the vendor's title prove bad, the auction duty will be allowed; provided complaint thereof be made before the Commissioners of Excise, or two Justices of the Peace, within whose jurisdiction such sale was made, within twelve calendar months after the sale, if the same shall be rendered void within that time; or otherwise within three months after the discovery of the owner having no title (*d*).

But I understand, that the duty will not be allowed, unless the commissioners think the vendor has used his *utmost exertions* to make a good title.

An appeal, however, lies from the judgment of

(*c*) See 6 Ves. Jun. 629; Wren v. Kirton, 8 Ves. Jun. 502; and see Twining v. Morris, 2 Bro. C. C. 316.

(*d*) 19 Geo. III. c. 56. s. 11; 28 Geo. III. c. 37. s. 19.

the

the commissioners, to the Court of Exchequer, in a summary way; but, as the King never pays costs, they fall upon the vendor, and in many cases would amount to more than the duty itself.

It frequently happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in his pulpit. Such a proceeding evidently calls for some remedy; and it is conceived, that where any person has been put to expense in attending at the place appointed for the sale, he may sustain an action for damages against the vendor, or against the auctioneer, if he refuse to disclose the name of his principal; for notice of an intended sale by auction, seems to be a contract with all the world, and if so, the owner cannot countermand the sale, and sell by private contract (*e*).

To prevent any question arising on this point, it should be stated in the advertisements, that the estate will be sold by auction at the place and time fixed upon, *unless previously sold by private*

(*e*) See 3 Ves. Jun. 628.

contract; *in which case notice of the sale shall be immediately given to the public.*

The particulars and conditions of sale (*f*) next claim our attention.

Great care should be taken to make them accurate; for the auctioneer cannot contradict them at the time of sale, although very usually done, such verbal declarations being inadmissible as evidence.

Thus where estates were put up to sale by auction (*g*), and in the printed particulars of sale were stated *to be free from all incumbrances*; they were bought by a person who, discovering that there was a charge on the estate of 17*l.* per annum, refused to complete the purchase. In consequence of which, an action was brought by the vendor; and although he offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction-room, when the estate was put up, that it was charged in the manner above specified, yet the Court of C. B. refused to admit the evidence, and the plaintiff was nonsuited.

If, however, the purchaser have particular personal information given him of the incumbrance, it seems that the sale will be supported (*h*).

(*f*) See a form of them, Appendix, No. 4.

(*g*) Gunnis v. Erhart, 1 H. Black. 289.

(*h*) S. C.

If

If printed conditions are pasted up in the auction-room, where they may be seen, they will be binding on the purchaser, although he did not see them (*i*).

The late Mr. Bradley recommended, that where it is understood, at the time of a sale, that the vendor has only a doubtful title, a provisional clause, to the following effect, should be inserted in the conditions of sale, and articles of purchase; which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale:

"That if the counsel of the purchaser shall, on the examination of the title, be of opinion, that a good title and conveyance cannot be made of the purchased premises, within the time limited by the articles for the carrying the same into execution; in that case, the same articles shall be discharged, and not further proceeded in on either side."

The estate cannot be too minutely described in the particulars; for although, as Lord Thurlow observed, it is impossible that all the little particulars relative to the quantity, the situation, &c. should be so specifically laid down, as not to call for some allowance and consideration, when the bargain comes to be executed (*k*); yet if a person,

(*i*) Mesnard v. Aldridge, 3 Esp. Ca. 271.

(*k*) See 1 Ves. Jun. 224, per Lord Thurlow.

however unconversant in the actual situation of his estate, will give a description, he must be bound by that, whether conusant of it or not (*l*).

Where the title-deeds cannot be delivered up, some provision should be made as to the expense of the attested copies, and the covenants to produce them, which will otherwise fall upon the vendor (*m*); and where the estate is sold in many lots, and the title-deeds are numerous, nearly the whole purchase-money may, perhaps, be exhausted. In one case, the lots were more than 200, and the copies came to 2000*l*.

If the estate intended to be sold, is vested in devisees in trust to sell, and there is no person to enter into the usual covenants for the title, that circumstance should be mentioned in the particulars.

If the estate is leasehold, and the vendor has not got an abstract of the lessor's title, this fact should be stated in the conditions (*n*). And it should invariably be provided in conditions of sale of a leasehold estate, that the purchaser shall enter into the usual covenants with the vendor, for indemnifying him against the rent and covenants (*o*).

(*l*) See 1 Ves. Jun. 213, per Lord Thurlow.

(*m*) Dare v. Tucker, 6 Ves. Jun. 460; and Berry v. Young, 2 Esp. Ca. 640. N.

(*n*) See *post*. ch. 7.

(*o*) See Pember v. Mathers, 1 Bro. C. C. 52.

It

It should always be stated in the conditions, that the conveyance shall be prepared *by*, and at the expense of the purchaser (*p*).

The usual condition, "that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to resell the estate; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter," should never be omitted; because if the purchaser do not comply with the conditions, the vendor may, by virtue of this stipulation, resell the estate, and recover the deficiency and charges from the purchaser (*q*).

If the money produced by the second sale, exceed the original purchase-money; the purchaser who has violated the agreement, will not be entitled to the surplus, but the vendor himself will be entitled to retain it.

A bidding may be countermanded at any time before the lot is actually knocked down (*r*). The countermand of a bidding, would in some cases be of the most serious consequences, and it might

(*p*) See *post*. ch. 4.

(*q*) *Ex parte* Hunter, 6 Ves. Jun. 94; and see Moss v. Matthews, 3 Ves. Jun. 279; Mertens v. Adcock, 4 Esp. Ca. 251.

(*r*) Payne v. Cave, 3 Term Rep. 148.

therefore

therefore be advisable to stipulate in the conditions of sale, that no persons shall retract their biddings.

Although the duty is by the Acts imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at the sale by auction; and in such case the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the condition; and upon neglect or refusal to pay the same, such bidding is declared by the Acts to be null and void to all intents and purposes (*s*).

It is usual to make some provision respecting the payment of the auction duty, and indeed, where the purchase-money is liable to the duty, a stipulation of this nature should never be omitted, unless the vendor intend to pay the whole duty himself.

And here it may be necessary to recall the attention to the decision in Coare v. Creed; for it is rare to meet with any stipulation respecting the payment of the auction duty on the sale of a bankrupt's estate, under Lord Rosslyn's order, for the

(*s*) 17 Geo. III. c. 50. s. 8.

benefit

benefit of a mortgagee; although, as we have before seen (*t*), the duty is payable in respect of the sale.

The other provisions which ought to be inserted in conditions of sale, are so well known as not to require notice.

If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable; but it seems his principal would not (*u*). But unless he were expressly limited as to price, and not enabled to go beyond the limits of his authority, his principal would be bound (*x*).

If an auctioneer give credit to the vendee, or take a bill, or other security, for the purchase-money, it is entirely at his own risk; as the vendor can compel him to pay the money (*y*).

The auctioneer should not part with the deposit until the sale be carried into effect (*z*); because he is considered as a stake-holder, or depositary of it; and therefore an action will lie against him for recovery thereof, if the purchaser be entitled to recover it.

(*t*) *Supra*, p. 12.

(*u*) See Ambl. 498.

(*x*) Hicks v. Hankin, 4 Esp. Ca. 114.

(*y*) Williams v. Millington, 1 Hen. Blackst. 81.

(*z*) Burrough v. Skinner, 5 Burr. 2639; Berry v. Young, 2 Esp. Ca. 640. N.

And

And unless an auctioneer disclose the name of his principal, an action will lie against him for damages on breach of contract (*a*).

It may here be remarked, that a deposit is considered as a payment in part of the purchase-money (*b*), and not as a mere pledge; which was also the rule of the civil law, where money was given; but if a ring, &c. was given by way of earnest, or pledge, it was to be returned (*c*).

If pending a suit for specific performance, a deposit be laid out in the funds under the authority of the court, it will be binding on both vendor and vendee; and if laid out without opposition by the seller, it must be presumed to be with his assent; and in either case he must abide by the rise or fall of the funds (*d*).

Where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement, for the investment of the deposit.

No objection can be made to the whole of the

(*a*) Hanson v. Roberdeau, Peake's Ca. 120.

(*b*) Pordage v. Cole, 1 Saund. 319.

(*c*) Vin. l. 3. 24.

(*d*) Poole v. Rudd, 3 Bro. C. C. 49; and see Doyley v. the Countess of Powis, 2 Bro. C. C. 32.

deposit

deposit required by the conditions, not being paid by the purchaser; if the vendor, after the sale, agree to accept a less sum (*e*).

Although the deposit be forfeited at law, yet equity will relieve the purchaser, upon his putting the vendor in the same situation as he would have been in, had the contract been performed at the time agreed upon (*f*). But if a bill by a purchaser for a specific performance is dismissed, the court cannot order the deposit to be returned; as that would be decreeing relief (*g*).

Immediately after sale of an estate by auction, an agreement (*h*) to complete the purchase should be signed by the purchaser, or his agent; as sales by auction of estates are within the statute of frauds (*i*), and consequently, the vendor could not otherwise compel the execution of the contract.

The same observation of course applies to sales by private contract (*k*); as indeed do all such of the

(*e*) Hanson v. Roberdeau, Peake's Ca. 120.

(*f*) See *infra*. ch. 4.

(*g*) Bennet College v. Carey, 3 Bro. C. C. 390.

(*h*) See a form of an agreement, Appendix, No. 5.

(*i*) Walker v. Constable, 2 Esp. Ca. 659; 1 Bos. and Pull. 306; Stansfield v. Johnson, 1 Esp. Ca. 107; and Buckmaster v. Harrop, 7 Ves. Jun. 341. See *post*. ch. 3.

(*k*) Clerk v. Wright, 1 Atk. 12. See a form of an agreement, Appendix, No. 6.

foregoing

foregoing observations, as do not in their nature apply exclusively to sales by auction.

Where an estate is sold in lots, whether by public auction or private contract, the vendor should take attested copies of the parcels included in the different conveyances; as a cautious purchaser of any part of the estate, will probably require some evidence, that no part of the estate bought by him, is included in any of the conveyances to the other purchasers.

CHAP-

CHAPTER II.

OF SALES UNDER THE AUTHORITY OF THE COURTS OF EQUITY.

We have already seen, that sales under the decrees of the Court of Chancery, or Exchequer, are not liable to the auction duty, and that public notice of a vendor's intention to bid for the estate is not necessary; it follows, that *no* notice need be given previously to the sale of an estate under a decree, of the vendor's intention to buy in the estate, if a particular price be not bid for it.

Where estates are sold before a master, under the decree of a Court of Equity, the court considers itself to have a greater power over the contract, than it would have, were the contract made between party and party (*a*); and as the chief aim of the court is to obtain as great a price for the estate as can possibly be got, it is in the habit of opening the biddings after the estate is sold.

Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings; and

(*a*) See 1 P. Wms. 747.

they

they will be opened more than once if a sufficient advance be offered (*b*); but the court will stipulate for the price, and not permit the biddings to be opened upon a small advance (*c*): and although an advance of 10 per cent. used generally to be considered sufficient, yet no such rule now prevails (*d*).

The determinations on this subject, assume a very different aspect, when the report is absolutely confirmed; and the following general rules may perhaps be laid down.

1st. That biddings are in general not to be opened after confirmation of the report (*e*): increase of price alone is not sufficient, however large, although it is a strong auxiliary argument, where there are other grounds.

In a case (*f*), however, before Lord Rosslyn,

(*b*) Scott v. Nisbett, 3 Bro. C. C. 495.

(*c*) Anon. 2 Ves. Jun. 487; Upton v. Lord Ferrers, 4 Ves. Jun. 700; Anon. 5 Ves. Jun. 148; and Tait v. Lord Northwicke, 5 Ves. Jun. 655.

(*d*) Andrews v. Emerson, 7 Ves. Jun. 420.

(*e*) See 2 Ves. Jun. 53; Scott v. Nisbett, 3 Bro. C. C. 475; Boyet v. Blackwell, 3 Anstr. 656; Prideaux v. Prideaux, 1 Bro. C. C. 287; and see 2 Ves. Jun. 53.

(*f*) Chetham v. Grugeon, 5 Ves. Jun. 86; and see his lordship's decision in Prideaux v. Prideaux, *ubi sup.* when Lord Commissioner.

this

this rule, although so frequently acknowledged, and acted upon, was not attended to; but biddings were opened after the report was confirmed, merely on an advance of price.

2dly. That very particular circumstances may induce the court to open the biddings after confirmation of the report, if the advance be considerable.

Thus in a case (*g*) where the owner of the estate, (who joined in a motion for the purpose of opening biddings after the report was absolutely confirmed) was in prison at the time of the confirmation, and it appeared, that he would have opened the biddings before confirmation of the report, had he been able, and had even directed persons to bid more than what the estate sold for, who deceived him; and an advance of 4,000 *l.* (being more than one-fourth of the original purchase-money) was offered, the biddings were opened, on the deposit of the 4,000 *l.* being made.

3dly. That fraud will be a sufficient ground for opening the biddings.

Therefore, if the bidders agree not to bid against each other (*h*): or a survey be made of an estate,

(*g*) Watson v. Birch, 2 Ves. Jun. 51. 4 Bro. C. C. 172.

(*h*) See 2 Ves. Jun. 52.

with some degree of collusion with the tenants (*i*), and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey: or the purchaser of the estate be partner with the solicitor of the cause, and is in possession of some particular knowledge to the benefit of which the other parties were entitled (*k*): in all these cases, the court would open the biddings, notwithstanding they had absolutely confirmed the report.

Where the biddings are opened, the advance is ordered to be deposited immediately (*l*), and the costs of the purchaser to be paid by the person opening the biddings; but the court will not direct the master to allow a specific expense (*m*).

If the biddings are opened, the estate may be allotted for sale in a different manner to what it at first was (*n*).

As the biddings are opened for the benefit of

(*i*) Ryder v. Gower, 6 Bro. P. C. 148; and see 2 Ves. Jun. 53.

(*k*) Price v. Moxon, July 14, 1754, before Lord Hardwicke; see 6 Bro. P. C. 155; 2 Ves. Jun. 54.

(*l*) Anon. 6 Ves. Jun. 513.

(*m*) Anon. 2 Ves. Jun. 286. See Watts v. Martin, 4 Bro. C. C. 113; and see *ibid.* 178.

(*n*) Watts v. Martin, 4 Bro. C. C. 113.

the

the suitor, no other person will be favoured in that respect.

Thus upon a motion to open a bidding of 5020 *l.* (*o*), upon the ground of mistake as to the time of sale, and an overbidding of 150 *l.*; the Lord Chancellor refused it, saying, he would not open it for a less sum than 500 *l.*, and that the circumstance, that the bidder was too late, was no ground at all.

The person who is desirous of opening the biddings having been present at the sale, is no objection to their being opened; although a greater advance may on that account be required (*p*).

A man opening the biddings, on the behalf of a person not in existence, will himself be decreed to be the purchaser (*q*).

Where a person is permitted to open the biddings upon the usual terms, paying the costs, and making a deposit, and the estate is bought by another person, the person opening the biddings is entitled to take back his deposit; but he is not entitled to an allowance for his costs, as they are

(*o*) Anon. 1 Ves. Jun. 453.

(*p*) Rigby v. M'Namara, 6 Ves. Jun. 117.

(*q*) Molesworth v. Opie, 1 Dick. 290.

in the nature of a premium paid by him for the opportunity of bidding (*r*).

Under special circumstances, however, they might be allowed: if a relation came forward for the benefit of the family, and the lot was knocked down by mistake, that might be a ground for relief (*s*).

It seems, that if a person purchase several lots of an estate, and the biddings are opened as to one, he shall have an option to open them all (*t*).

The bidder not being considered as purchaser, until the report is confirmed; until then, he is not compellable to complete his purchase (*u*): but upon the report being confirmed, he will be compelled to carry the contract into execution (*v*).

If the purchaser neglect to complete his purchase, the practice is, to confirm the report; and then, if the purchaser is supposed to be responsible, to get an order to inquire, whether the party can make out a good title; and, if he can, to ob-

(*r*) Rigby v. M'Namara, 6 Ves. Jun. 466. Earl of Macclesfield v. Blake, 8 Ves. Jun. 214.

(*s*) Earl of Macclesfield v. Blake, *ubi sup.*

(*t*) See 3 Anstr. 657.

(*u*) Anon. 2 Ves. Jun. 335.

(*v*) Barker v. Holford, and Eggiston v. Flavel, 2 Anstr. 344, cited.

tain

tain an order upon the purchaser to complete his purchase, but if the purchaser is unable to complete his purchase, then, on the report being confirmed, it is moved to discharge him from the bidding (*w*).

The court will, on motion, discharge the purchaser, and substitute any other person in his stead; but this will not, however, be done, unless such person pay in the money, and an affidavit be made, that there is no underbargain; for the new purchaser may give the other a sum of money to stand in his place, and so deceive the court (*x*). Formerly the practice seems to have been, to require the consent of all the parties in the cause, as well as the consent of the original purchaser (*y*).

Where two or more persons purchase one lot, the money must be paid altogether: the court will not allow them to pay their proportions separately (z), on account of the confusion which might ensue.

Where any of the parties refuse, or are incom-

(*w*) Cunningham v. Williams, 2 Anstr. 344.

(*x*) Rigby v. M'Namara, 6 Ves. Jun. 515. Vale v. Davenport, 6 Ves. Jun. 615.

(*y*) Matthews v. Stubbs, 2 Bro. C. C. 391.

(z) Darkin v. Marye, 1 Anstr. 22.

petent to consent, a purchaser cannot apply any part of his purchase-money in discharge of an incumbrance on the estate, which does not appear upon the report: though, perhaps, if the parties be all competent to consent, and do consent, it may be done (*a*).

Although more of an estate is sold, than is necessary for the purposes of the trust by virtue of which the decree was made, yet the purchaser can make no objection to it; the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole. If, however, the decree were, that the master should sell Greenacre, and he sells Blackacre, an objection to the sale would be good (*b*): although, it seems, that as a general rule, it may be laid down, that a purchaser shall not lose the benefit of his purchase, by any irregularity of the proceedings in a cause (*c*).

The payment of a deposit, and the investment thereof in the funds, is governed by the same rules as are adhered to, where the contract is between party and party (*d*).

(*a*) ——— v. Stretton, 1 Ves. Jun. 266.

(*b*) Lutwych v. Winford, 2 Bro. C. C. 248.

(*c*) Lloyd v. Johnes, 1 Ves. Jun. N. S. 38.

(*d*) *Vide supra*, p. 29.

It

It seems, that a purchaser, on submitting to forfeit his deposit, is not bound to proceed in his purchase, where the price is unreasonable, or the contract is in other respects inequitable (*e*).

But where the contract is not inequitable, a purchaser must proceed in his purchase, and will not be permitted to forfeit his deposit, and abandon the contract.

Therefore, on a recent application, by the persons who opened the biddings for General Birch's estate (*f*), to the court, to forfeit their deposit, which was resisted by the creditors, for whose benefit the estate was sold, the court held the purchasers to their bargain, and would not permit them to rescind the contract.

If an estate directed to be sold before a master, is sold by private contract, or in any other manner contrary to the order of the court, and not actually conveyed to the purchaser, the court will take no notice of the sale, but will direct the estate to be sold before the master, according to the decree (*g*).

And if in a case of this nature the purchaser had notice of the decree, he will have no re-

(*e*) Savile v. Savile, 1 P. Wms. 745.

(*f*) *Vide supra*, p. 33.

(*g*) Annesly v. Ashurst, 3 P.Wms. 282. See *Ex parte* Hughes, 6 Ves. Jun. 617.

medy; but if he bought without notice, he may recover at law, for breach of the agreement (*h*).

A purchaser under a decree, is entitled to be let into possession from the quarter-day preceding his purchase; paying his money before the following one.

But this rule does not apply to a colliery, or any other estate which is considered as a trade. In such a case, the purchaser is entitled to the profits, only from the commencement of the month in which he purchased; paying his purchase-money in the course of that month (*i*).

A sale before a master is not within the statute of frauds, and after confirmation of the master's report of the best purchaser, the sale will be carried into effect, even against the representative of the purchaser, although he did not subscribe; the judgment of the court taking it out of the statute (*k*).

And even if the authority of an agent should not be admitted, and could not be proved; yet, if the master's report could be confirmed, the sale would be carried into execution, unless fraud could be proved (*l*).

(*h*) Raymond v. Webb, Lofft. 66.

(*i*) Wren v. Kirton, 8 Ves. Jun. 502.

(*k*) Attorney-General v. Day, 1 Ves. 218.

(*l*) S. C. Per Lord Hardwicke.

CHAP.

CHAPTER III.

OF THE FOURTH SECTION OF THE STATUTE OF FRAUDS.

By the fourth section of the Statute of Frauds (*a*) (to which we had occasion to refer at the close of the two last chapters), it is enacted, That no action shall be brought to charge any person on any agreement made upon any contract or sale of lands, &c. or any interest in them (4); unless such agreement, or some note thereof, be in writing, and signed by the person to be charged, or some other by him authorised.

The Act extends as well to interests created *de novo*, as to subsisting interests (*b*).

To shew what agreements are taken out of the statute, we may consider, I. What is a sufficient agreement: II. What is a sufficient signature: and

(*a*) 29 Car. II. c. 3. (*b*) Anon. 1 Ventr. 361.

(4) "Or upon any agreement not to be performed within a year;" which clause does not extend to any agreement concerning lands. Hollis v. Edwards, 1 Vern. 159.

III. What

III. What agreements are not within the statute, although by parol. And,

I. First then, it has been decided, that a note or letter will be a sufficient agreement to take a case out of the statute (*c*); but it must be duly stamped before it can be read (*d*); and, as this ought to be done, the court will assist either party in obtaining the agreement for that purpose.

Thus, in Fowle v. Freeman (*e*), the agreement was sent by the vendor to his attorney, with a letter written at the bottom, directing him to prepare a technical agreement. The vendor afterwards refused to perform the contract, and the attorney would not deliver the agreement to the purchaser for the purpose of getting it stamped, contending that it was a private letter to him; but the court, on motion, ordered it to be delivered to the purchaser for that purpose.

If upon a treaty for sale of an estate, the owner write a letter to the person wishing to buy it, stating, that if he parts with the estate it shall be on such and such terms (specifying them); and such person, upon receipt of the letter, accepts the

(*c*) Coleman v. Upcot, 5 Vin. Abr. 527. pl. 17.

(*d*) Ford v. Compton, 2 Bro. C. C. 32.

(*e*) Rolls, March 8, 1804. MS. stated *infra*. See Clarke v. Terrel, 1 Smith's Rep. 399.

terms

terms mentioned in it, the owner will be compelled to perform the contract *in specie* (*f*).

So, if a man (being in company) makes offers of a bargain, and then writes them down and signs them; and another person takes them up and prefers his bill, that will be a sufficient agreement to take the case out of the statute (*g*).

The note or letter must, however, specify the terms of the agreement, or otherwise all the danger of perjury which the statute intended to guard against, would be let in.

Thus, upon the sale of nine houses which were in mortgage, the vendor wrote a letter to the mortgagee, to this effect: "Mr. Leonard, pray deliver my writings to the bearer; I having disposed of them. Am, &c." The vendor afterwards refused to perform the contract, and pleaded the statute of frauds to a bill filed by the purchaser for a specific performance; and the plea was allowed; because it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for this mentioned not the sum that was to be paid, nor the number of houses that were to be disposed of, whether all, or

(*f*) Coleman v. Upcot, 5 Vin. Abr. 527. pl. 17.

(*g*) S. C. Per Lord Chancellor. See Knight v. Crockford, 1 Esp. Ca. 189.

some,

some, or how many; nor to whom they were to be disposed of; neither did this letter mention whether they were disposed of by way of sale or assignment of lease (*h*).

So where (*i*), upon a parol agreement, the vendor sent a letter to the purchaser, informing him that, at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that he (the purchaser) should not have the estate, unless he would give a larger price; Lord Hardwicke held, the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein mentioned.

Neither will a performance be compelled on a note or letter, in which the most trifling error or omission appears.

Thus in a case (*k*) before Lord Hardwicke, the bill was brought to have a specific performance of an agreement, from letters which had passed between the parties. It appeared that ten years purchase was to be given for the land, but it could not be ascertained whether the rents upon a few cow-

(*h*) Seagood v. Meale, Prec. Cha. 560.

(*i*) Clerk v. Wright, 1 Atk. 12.

(*k*) Lord Middleton v. Wilson, *et e contra.* Chan. 1741, MS. S. C, Lofft. 801, cited.

gates

gates were 5*s.* or 1*s.*; and although there was no other doubt, Lord Hardwicke held, that such an agreement could not be carried into execution. He said, that in these cases it ought to be considered, whether at law the party could recover damages; for if he could not, the court ought not to carry such agreements into execution.

But although a letter do not contain the whole agreement, yet if it refer to a writing that does, that will be sufficient, although such writing is not signed.

Thus in a case (*l*) where an agreement for sale was reduced into writing, but not signed, owing to the vendor having failed in an appointment for that purpose; the vendee's agent wrote to urge the signing of the agreement; and the vendor wrote in answer a letter, in which, after stating his having been from home, he said, "his word should always be as good as any security he could give." And this was held to take the case out of the statute, as clearly referring to the written instrument.

It seems that a note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will, sub-

(*l*) Tawney v. Crowther, see Forster v. Hale, 3 Ves. 3 Bro. C. C. 161. 318; and Jun. 696.

ject

ject to the before-mentioned rules, be a sufficient agreement to take a case out of the statute (*m*).

But rent-rolls, particulars of estates, abstracts, &c. delivered by the vendor on the treaty for sale, will not be considered as an agreement, although signed by him, and containing the particulars of the agreement; nor will letters written, or representations made by him to creditors, concerning the sale, receive that construction.

Thus in a case (*n*) where A. agreed by parol with B. for the purchase of lands; shortly afterwards, a rent-roll was delivered to A. which B. dated and altered in his own hand-writing: and it was intitled, "Lands agreed to be sold by B. to A. from, &c. at 21 years purchase, for the clear yearly rent." An abstract of the title, also stating the contract, was delivered by A.'s agent, and also further particulars and papers at different times. B. also wrote to several of his creditors, informing them that he had agreed with A. for the sale of his estate, at 21 years purchase; referred tenants to A. as owner of the estate; and set up the contract as a bar to an *elegit*. B. afterwards refused

(*m*) Seagood v. Meale, Prec. Cha. 560. Cook v. Tombs, 2 Anstr. 420. Welford v. Beazely, 3 Atk. 503.

(*n*) Whaley v. Bagenal, 6 Bro. P. C. 45.

to

to perform the agreement; and to a bill filed for a specific performance, pleaded the statute of frauds, and the plea was allowed.

So, in a later case (*o*), upon a bill filed by a vendee, for a specific performance of a parol agreement, for sale of lands, it appeared that the vendor gave the purchaser a particular of the property to be sold, with the terms and conditions all in his own hand-writing, and signed by him; and it was afterwards delivered, by agreement of both parties, to an attorney, to prepare the conveyance from; who prepared a draft, and brought it to the parties, and they read over and approved of it, and agreed to execute the same, whenever a fair copy could be written out. The defendant, however, refused to fulfil his part of the agreement, and pleaded the statute of frauds to the bill; and, as the particular was delivered at the outset of the treaty, no agreement being then made, the court held it could only be delivered as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value; that the signing the particular could have no other effect than to give it authenticity,

(*o*) Cook v. Tombs, 2 Waterhouse, Prec. Cha. 29, Anstr. 420; and see Cass v.

as

as a true list of the items then offered for sale; and that the subsequent acts could not affect the original nature of the particular, and turn it into an agreement.

Although an agreement be reduced into writing, by a person present at the making of it, yet if the parties do not sign it, they will not be bound by it (*p*).

If an agreement contain all the terms, the sending of it, as instructions to a person to prepare a proper agreement, will not be deemed an intention to extend the agreement, but merely to reduce it into technical language.

Thus, in Fowle v. Freeman (*q*), after some treaty for the purchase of an estate, certain terms were agreed upon and written down by Freeman the vendor, and afterwards written out by him as an agreement, viz.—"March 12th, 1803. I agree to sell to Mr. Fowle my estate, &c. for the sum of 27,000*l.* upon the following conditions, &c." (stating them). Freeman signed this agreement, and read it to Fowle, who approved of it. Freeman then underwrote a letter to his solicitor in town, to the following effect:—"Sir, please to

(*p*) Gunter v. Halsey, Ambl. 586. Whitchurch v. Bevis, 2 Bro. C. C. 559.

(*q*) Rolls, 8th March 1804. MS.

prepare

prepare a proper agreement for Mr. Fowle and me to sign, and send it to me at this place. You will also deliver to Mr. Everett," the gentleman who carried the letter to town, "an abstract of my title-deeds for his examination. As soon as the title-deeds are approved of, he engages to lend me 5,000*l.* 'till Michaelmas next." This letter was signed and dated by him, and was delivered by Mr. Everett to the solicitor in town. Freeman afterwards refused to perform the agreement; and, to a bill filed by Fowle for a specific performance, pleaded the statute of frauds.

The Master of the Rolls, after stating the case, said, the question was, whether the letter written at the bottom of the agreement should overturn it, supposing it was good before? If the attorney had prepared an agreement, according to the letter, Freeman would have been compelled to execute it, and the attorney could not alter the agreement itself in any one respect. A letter or proposal will do, although the party repents, and many decrees have been founded merely on letters. If this objection were to hold, it might be contended, that if an agreement contained a reference to title-deeds, it would not do; and his Honor decreed a specific performance.

There was a point made in this case, as to a

term, for the benefit of a tenant, being omitted in the agreement; but upon the evidence, the Master of the Rolls thought it must have been objected to by the purchaser, and have been agreed to be omitted.

II. We are next to consider what is a sufficient signature. Before the statute of frauds, an agreement, although reduced into writing and signed, was not considered as a written agreement, unless sealed; but it was regarded as a parol agreement, and the writing as evidence of it.

It has been said, the same rule prevails since the statute of frauds (*s*); and, in the case of Wheeler v. Newton (*t*), the agreement not having been sealed, seems to have been insisted upon, as leaving the case within the statute. In this case Lord Commissioner Rawlinson said, that agreements in writing, though not sealed, *had some better countenance*, since the statute of frauds and perjuries, than they had before.

It seems strange, that any doubt could arise on this point, as the statute makes signing only requisite to the validity of a written agreement, and it is now very clear, that sealing is not necessary.

(*s*) See Marquis of Normanby v. Duke of Devonshire, 2 Freem. 216.

(*t*) Prec. Cha. 16.

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The signature required by the statute, is to have the effect of giving authenticity to the *whole* instrument; and where the name is inserted, in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found (*u*).

Therefore, the signing the name at the beginning of the agreement, will take it out of the statute; as if a person write the agreement himself, and begin, "A. B. agrees to sell, &c." and this is only in analogy to the case of a testator writing his name at the beginning of his will, which is equivalent to his signing it, and yet the statute expressly requires signing (*x*).

And such a signature will be sufficient, although a place be left for a signature at the bottom of the instrument (*y*).

And if the party know the contents of the agreement, a subscription, as a witness, is a sufficient signing (*z*).

(*u*) Vide Stokes v. Moore, stated *infra*.

(*x*) Knight v. Crockford, 1 Esp. Ca. 189; and see 1 Bro. C. C. 410; 3 Esp. Ca. 182; and Saunderson v. Jackson, 2 Bos. & Pull. 238.

(*y*) Saunderson v. Jackson, *ubi sup.*

(*z*) Welford v. Beazely, 3 Atk. 503.

So, where a clerk of an agent signed an agreement thus, "Witness, A. B. for C. D. agent to the seller," it was holden to be out of the statute (*a*).

But a name inserted in the body of an instrument, *and applicable to a particular purpose*, will not amount to such an authentication as the statute requires.

Thus in a case (*b*), where the defendant wrote instructions for a lease to the plaintiff, in these words, viz. "The lease renewed; Mr. Stokes to pay the King's tax; also to pay Moore 24*l.* a year, half-yearly; Mr. Stokes to keep the house in good tenantable repair, &c." the Court of Exchequer held it not to be a sufficient signing, to take the agreement out of the statute.

And, *a fortiori*, the mere altering the draft of conveyance, will not take a case out of the sta-

(*a*) Coles v. Trecothick, 1 Smith's Rep. 233.

(*b*) Stokes v. Moore, Cox's n. (1) to 1 P. Wms. 771. This case of course depended on the 1st section of the statute of frauds, but it is an authority in point, as the 1st and 4th sections in this respect are in nearly the same words, and receive the same construction. In Coles v. Trecothick, 1 Smith's Rep. 233, Lord Eldon said, he had some doubt of the doctrine in this case; and Mr. Romilly observed, that Mr. Cox's note was not perfect.

tute

tute (*c*); neither will the writing over of the whole deed, by the defendant, with his own hand, be sufficient, as there must be a signature (*d*).

The statute requires the writing to be signed only by the person to be charged; and therefore, if a bill be brought against a person who signed an agreement, he will be bound by it, although the other did not sign it (*e*), as the agreement is signed by the person to be charged.

If a written agreement has been in part executed, an agreement subsequently entered into by the parties, and reduced into writing, will bind them both, if signed by one of them (*f*).

In the 1st section of the statute of frauds, which relates to leases, &c. the writing is required to be signed by the parties making it, or their agent, *authorised by writing*. This latter requisite is, probably by mistake, omitted in the 4th section of the statute; and therefore an agent may be au-

(*c*) Hawkins v. Holmes, 1 P. Wms. 770.

(*d*) Ithel v. Potter, 1 P. Wms. 771, cited.

(*e*) Hatton v. Gray, 2 Cha. Ca. 164; Cotton v. Lee, 2 Bro. C. C. 524; Coleman v. Upcot, 5 Vin. Abr. 527. pl. 17; Buckhouse v. Crossby, 2 Eq. Ca. Abr. 32. pl. 44; Seton v. Slade, 7 Ves. Jun. 265; Fowle v. Freeman, Rolls, 8th March, 1804. MS.

(*f*) Owen v. Davies, 1 Ves. 83.

thorised by parol to treat for or buy an estate, although the contract itself must be in writing (*g*).

And where an agent is authorised to sell at a particular price, it seems his clerk may contract, without any special authority for that purpose (*h*).

Sales *by auction* of *goods* are not within the statute of frauds and perjuries (*i*), because the auctioneer is considered as agent for the buyer, after knocking down the hammer, as well as for the seller; and his setting down, in writing, the name of the buyer, the price, &c. takes it out of the statute. But this point cannot be considered as settled upon these reasons, as they would certainly apply as forcibly to sales of estates, as to sales of goods; and the Court of B. R. in Simon v. Motivos, certainly intended the rule to apply to both; for it seems they inclined to think, "that buying and selling at auctions was *not* within the statute of frauds." And in the late case of Coles v. Trecothick (*h*), Lord Eldon, in speaking of this

(*g*) Waller v. Hendon, 5 Vin. Abr. 523, pl. 45; Wedderburne v. Carr, in the Exchequer, T.T.1775; 3 Woodd. 427, cited; Coles v. Trecothick, 1 Smith's Rep. 233.

(*h*) Coles v. Trecothick, *ubi sup.*

(*i*) Simon v. Motivos, 3 Burr. 1921.

(*k*) 1 Smith's Rep. 233.

point,

point, said, "he confessed that he could trace no weighty distinction between the cases."

It has, however, been repeatedly held, that sales by auction of *estates* are within the statute of frauds and perjuries, and that the auctioneer setting down the name of the buyer, will not take the case out of the statute (*l*).

If an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property which was sold with it (*m*).

A written agreement, although duly signed according to the statute of frauds, may be discharged by a subsequent independent parol agreement (*n*); but very clear proof will be expected of such agreement (*o*).

A defendant resisting a specific performance of

(*l*) Walker v. Constable, 2 Esp. Ca. 659; 1 Bos. & Pull. 306; Stansfield v. Johnson, 1 Esp. Ca. 107; Buckmaster v. Harrop, 7 Ves. Jun. 341.

(*m*) Cook v. Tombs, 2 Anstr. 420; Lea v. Barber, *ibid.* 425, cited.

(*n*) Goman v. Salisbury, 1 Vern. 240; Legal v. Miller, 2 Ves. 299; and see 5 Vin. Abr. 522, pl. 38.

(*o*) Buckhouse v. Crossby, 2 Eq. Ca. Abr. 32, pl. 44.

an agreement in writing, may go into parol evidence to prove, that by fraud the written agreement does not express the real terms; but a plaintiff will not be allowed to enter into such evidence, for the purpose of obtaining a performance *in specie* of an agreement, different to that expressed in the written instrument; and, on a bill for that purpose, a decree would not be made, even according to the written agreement, although the plaintiff should request it: but the bill would be dismissed, without prejudice to another bill for that purpose (*p*).

III. We have seen what is considered an agreement and signature, sufficient to take a case out of the statute; but there are cases, in which the performance of an agreement will be compelled, although the terms of it are not reduced into writing: for though the statute provided that no agreement shall be good, unless signed by the party to be bound thereby, or some person authorized by him, yet on all the questions on that statute in equity, the purport of making it has been considered, viz. to prevent frauds and perjuries; so that any agreement, in which there is no danger of

(*p*) Woollam v. Hearn, 7 Ves. Jun. 211. See Legal v. Miller, *ubi sup.*; and see Jordan v. Sawkins, 3 Bro. C.C. 388.

either,

either, the court has considered out of the statute; upon which there have been many determinations (*q*).

Thus it has been repeatedly decided (*r*), that if a bill be brought for the execution of an agreement, not in writing, nor so stated, yet if the defendant put in his answer, and confess the agreement, that takes the case entirely out of the mischief intended to be prevented by the statute, and there being no danger of perjury, the court would decree it; and if the defendant should die, upon a bill of revivor against his heir, the same decree would be made as if the ancestor were living, the principle going throughout, and equally binding the representatives (*s*).

In a case (*t*), where the plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both, a specific performance was decreed of the agreement, as admitted by the answers.

(*q*) Per Lord Hardwicke. See 1 Ves. 221.

(*r*) Croyston v. Bayne, Prec. Cha. 20; and see *ibid.* 374; 1 Ves. 221, 441; Ambl. 586; and Hosier v. Read, 9 Mod. 86.

(*s*) Per Lord Hardwicke. See 1 Ves. 221.

(*t*) Mortimer v. Orchard, 2 Ves. Jun. 243.

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The opinion seems formerly to have been, that if the defendant confessed the agreement, the court would compel him to execute it, although he insisted on not performing it (*u*): but the rule, as now settled, appears to be, that though the agreement be admitted, the statute may be used as a bar to the relief (*v*).

Where, however, a defendant has by answer admitted the agreement, and submitted to perform it, he cannot, by an answer to an amended bill, plead the statute of frauds (*w*).

There are other cases taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. As where agreements have been carried partly into execution (*x*), although a controversy might be afterwards between the parties as to the terms, yet if made out satisfactorily to the court, it would be decreed, though variety of evidence might be in the case; in order that one side might not take advantage of the

(*u*) Child v. Godolphin, 2 Dick. 39.

(*v*) Moore v. Edwards, 4 Ves. Jun. 23; Cooth v. Jackson, 6 Ves. Jun. 12.

(*w*) Spurrier v. Fitzgerald, 6 Ves. Jun. 548.

(*x*) See 3 Ves. Jun. 712, 713.

statute

statute to be guilty of fraud, the court would hold his conscience bound thereby (*y*).

An agreement, however, will not be considered as partly executed, unless the acts done are such as could be done with no other view, or design, than to perform the agreement; and if it do not appear but that the acts done might be done with other views, the agreement will not be taken out of the statute (*z*).

Neither will acts merely introductory, or ancillary to an agreement, be considered as a part performance, although attended with expense.

Therefore, delivering an abstract, giving directions for conveyances, and going to view the estate, or fixing upon an appraiser to value stock, making valuations, &c. (*a*) will not take a parol agreement out of the statute.

But if possession be delivered to the purchaser, the agreement will be considered as in part exe-

(*y*) Per Lord Hardwicke. See 1 Ves. 221; and see Taylor v. Beech, 1 Ves. 297.

(*z*) Gunter v. Halsey, Ambl. 586.

(*a*) Clerk v. Wright, 1 Atk. 12; Whitbread v. Brockhurst, 1 Bro. C. C. 412. See 2 Bro. C. C. 563; Whitchurch v. Bevis, 2 Bro. C. C. 559; Gunter v. Halsey, Ambl. 586; Whaley v. Bagenal, 6 Bro. P. C. 645; Cook v. Tombs, 2 Anst. 420; and see Cooth v. Jackson, 6 Ves. Jun. 12.

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cuted (*b*); especially if he expend money in building or improving (*c*), the statute, as was before observed, not being made to encourage frauds and cheats.

Possession, however, by a tenant (who of course continues in possession unless he has notice to quit), would not of itself take a case out of the statute, or even call for an answer (*d*).

Although possession be taken in pursuance of an agreement, and the answer admit that fact, yet, it seems doubtful whether the case will be taken out of the statute, if the agreement cannot be ascertained: the court, however, will endeavour to get at the terms (*e*).

Where a person purchases several lots of an estate by auction, a part performance as to one lot, by taking possession of it, will not be deemed

(*b*) Pyke v. Williams, 2 Vern. 445; Butcher v. Stapely, 1 Vern. 363; Lockey v. Lockey, Prec. Cha. 518; Earl of Aylesford's case, 2 Str. 783; Lacon v. Mertins, 3 Atk. 1; Bower v. Cator, 4 Ves. Jun. 91.

(*c*) Foxcraft v. Lister, 2 Vern. 456, cited; Floyd v. Buckland, 2 Freem. 268; Mortimer v. Orchard, 2 Ves. Jun. 243.

(*d*) Wills v. Stradling, 3 Ves. Jun. 378; and see Sansum v. Butter, 1 Bac. Abr. 74; Smith v. Turner, Prec. Cha. 561, cited; 3 Atk. 4; and Hole v. White, 1 Bro. C. C. 409, cited.

(*e*) Boardman v. Mortyn, 6 Ves. Jun. 467.

a part

a part performance as to the other lots; and will, therefore, only take the agreement out of the statute, as to the lot of which possession was taken (*f*).

Payment of a substantial part of the purchase-money, is also considered as taking a parol agreement out of the statute (*g*); and that, although the purchaser take the vendor's note of hand, or bond, for the money (*h*): but it must be a *substantial* part of the purchase-money, as a small sum, which could only be given by way of earnest, will not do (*i*); and, therefore, payment of 5 guineas, if the purchase-money be 100 guineas, will not take the case out of the statute (*j*). Mr. Booth appears to have entertained a different opinion. Where, he asks, will you strike the line? and who shall settle the *quantum* that shall suffice in payment of part of any purchase-money, to draw the case out of the statute, or ascertain

(*f*) Buckmaster v. Harrop, 7 Ves. Jun. 341.

(*g*) *Sed vide* Lord Pengall v Ross, 2 Eq. Ca. Abr. 46, pl. 12: but note, it has been said this case cannot be found in the register's book. See 4 Ves. Jun. 721.

(*h*) Lacon v. Mertins, 3 Atk. 1.

(*i*) Seagood v. Meale, Prec. Cha. 560.

(*j*) Main v. Melbourn, 4 Ves. Jun. 720.

what

what shall be deemed so trifling, as to leave the case within it (*k*)?

The payment of the auction duty, however considerable, will not enable the court to decree a specific performance of a parol agreement; as the revenue laws cannot be held to operate beyond their direct and immediate purpose, to affect the property, and vary the rights of the parties not within the intention of the Act (*l*).

In some cases it has been decided, that acts done by the defendant, could be made a ground for compelling him to perform the agreement; but in a late case (*m*) the Master of the Rolls held the contrary, because the ground on which the court acts is fraud in refusing to perform, after performance by the other party; but where the defendant has, for instance, paid part of the purchase-money, it is no fraud on the vendor, but a loss to himself, which ought not to be made a ground for a specific performance against his consent.

These remarks may be closed by observing, that equity seems to have been guided by nearly

(*k*) 1 Vol. Cas. and Opin. 136.

(*l*) Buckmaster v. Harrop, 7 Ves. Jun. 341.

(*m*) Buckmaster v. Harrop, *ubi sup.*

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the same rules in compelling a specific performance of parol agreements before the statute (*n*), as have been adhered to since; but still, the student cannot be too cautious in distinguishing the cases which were decided before the statute, from those decided subsequently. Much confusion has arisen from inattention to this point.

(*n*) See Miller v. Blandist, Toth. 85; Voll v. Smith, 3 Ch. Rep. 16; Simmons v. Cornelius, 1 Cha. Rep. 128; and Anon. 2 Freem. 128.

CHAP-

CHAPTER IV.

OF THE CONSEQUENCES OF THE CONTRACT.

IMMEDIATELY on the contract being made, equity considers the vendor as a trustee for the purchaser of the estate sold (*a*); and the purchaser, as a trustee of the purchase-money for the vendor (*b*).

Therefore the contract will not be discharged by the bankruptcy of either the vendor or vendee (*c*).

So, the death of the vendor before the conveyance, or even before the time agreed upon for completing the contract (in which event no action would lie against the heir), is in equity immaterial (*d*). The purchase-money will form part of the

(*a*) Atcherly v. Vernon, 10 Mod. 527; Davie v. Beardsham, 1 Cha. Ca. 39; and Lady Fohaine's case, cited *ibid.*; and see 1 Term Rep. 601; and Green v. Smith, 1 Atk. 573.

(*b*) Pollexfen v. Moore, 3 Atk. 272.

(*c*) Orlebar v. Fletcher, 1 P. Wms. 737. See 3 Ves. Jun. 255; and Bowles v. Rogers, 6 Ves. Jun. 95. N.

(*d*) Winged v. Lesebury, 2 Eq. Ca. Abr. 32, pl. 43.

vendor's

vendor's assets (*e*), and the heir will be bound to perform the covenant *in specie*, although his ancestor covenanted for himself, and not for his heirs (*f*).

Neither will the death of the vendee, before the completion of the contract, prevent it being carried into execution.

A vendee may sell or charge the estate contracted for, before the conveyance is executed (*g*).

So he may devise the estate, if freehold, before the conveyance; and if copyhold, before the surrender (*h*); and that, although the estate is contracted for at a future day (*i*), or the contract is

(*e*) Smith v. Hibbard, 2 Dick. 712. Note, the purchase-money is always deemed assets of the vendor; and even if a vendor reserve the purchase-money, payable as he shall appoint by will, executed in a particular manner, and afterwards exercise such power, yet the money will, as between his creditors and appointees, be assets. See Thompson v. Towne, 2 Vern. 319, 466.

(*f*) Gell v. Vermedum, 2 Freem. 199.

(*g*) Buckmaster v. Harrop, 7 Ves. Jun. 341; and see 1 Ves. 220; and 6 Ves. Jun. 352.

(*h*) Davie v. Beardsham, 1 Cha. Ca. 39; Greenhill v. Greenhill, 2 Vern. 679; Prec. Cha. 320; Milner v. Mills, Mose. 123; Alleyn v. Alleyn, Mose. 262.

(*i*) Commissioner Trimuel's case, Mose. 265, cited; and see Atcherly v. Vernon, 10 Mod. 527; Gibson v. Montfort, 1 Ves. 485.

entered into by a trustee for him (*k*), and the devisee will be entitled to have the estate paid for, out of the personal estate of the purchaser.

An estate contracted for, will pass by a general devise of all the lands purchased by the testator, although he may have purchased some estates which have been actually conveyed to him, and would therefore of themselves satisfy the words of the will (*l*).

On the other hand, estates recently purchased and actually conveyed, will pass with estates contracted for, by a general devise of all the manors, &c. for the purchase whereof the testator has already contracted and agreed (*m*)

If a man possessed of a term for years, contract for the purchase of the inheritance, the term, by construction of equity, instantly attends the inheritance; and therefore, by a devise of the estate subsequently to the contract, the fee-simple would pass, and the term as attendant on it (*n*).

And if the purchaser had, previously to the pur-

(*k*) Greenhill v. Greenhill, 2 Vern. 679.

(*l*) Atcherly v. Vernon, 10 Mod. 527.

(*m*) St. John v. Bishop of Winton, 1 Cowp. 94. Lofft. 113, 349. S. C.

(*n*) Per Sir Wm. Grant, *in casu* Capel v. Girdler, Rolls, 16 March 1804. MS.

chase,

chase, made his will, by a general bequest, in which the term would have passed, yet the legatee will not be entitled to it, although the bequest be not expressly revoked; because the term, by the construction of equity, attended the inheritance immediately on the purchase of the fee, and it must therefore follow it in its devolution on the heir (*o*).

It seems the same rule must prevail where the term is even *specifically* bequeathed; for if the fee had been actually conveyed, the conveyance would have operated as a revocation (*p*); and as the vendee is seised of the fee in contemplation of equity, although the conveyance be not executed, the same rules ought to be adhered to in each case (*q*).

Although the estate may, subsequently to the will, be conveyed, or surrendered, either to the purchaser (*r*), or to a trustee for him (*s*), yet that will

(*o*) Capel v. Girdler, *ubi sup.*

(*p*) Galton v. Hancock, 2 Atk. 424.

(*q*) See 1 Term Rep. 768, at the bottom.

(*r*) Parsons v. Freeman, 3 Atk. 741; Ambl. 116; and see 1 Ves. Jun. 235; 2 Ves. Jun. 429, 602; 6 Ves. Jun. 219; 8 Ves. Jun. 127; and Prideux v. Gibbin, 2 Cha. Ca. 144.

(*s*) Watts v. Fullarton, Dougl. 719, cited.

not operate as a revocation of his will (5). The legal estate will of course descend to the heir at law,

(5) In Brydges v. Duchess of Chandos, 2 Ves. Jun. 417, Lord Rosslyn, in treating of this point, said, "Another case is supposed to arise, in which this court determines upon a principle of equity, it is not said directly against the rule of law, but without attending to what the law would be: that is the case where an equitable estate is devised, and after the will the legal estate is taken, the court has said that does not revoke the will. It is difficult to state that, at this time of day, in a court of law, which could not look at the equitable interest, but looks only at the legal; but as the legal interest is only a shadow, the justice of the case is very evident; but it is a decision in conformity to the like case at law. The very case occurred at law in Rol. Abr. 616, pl. 3. *Cestui que use*, before the *statute of uses*, devises; afterwards the feoffees make a feoffment of the land to the use of the devisor; and after the statute the devisor dies; the land shall pass by the devise; because, after the feoffment, the devisor had the same use which he had before. That is exactly the case of an equitable estate devised, and a conveyance taken afterwards of the legal estate; and this court was so far from determining without considering what the rule of law would be, that here is the very point decided by a court of law."

The doctrine in question so evidently depends on the rules of equity for its support, that it is difficult to conceive the principle upon which a court of law could make the decision referred to by Lord Rosslyn.

The case is thus stated in Roll:—"*Si home aiant feffees a*

law, who will in equity be deemed a mere trustee for the devisee; unless the devisee, thinking the estate

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son use devant lestatut de 27 H. VIII. ust devise le terre al auter, & puis les feffees font feffment del terre al use del devisor, & puis lestatut le devisor morust, le terre passera per le devise, car apres le feffment le devisor avoit mesme l'use que il avoint devant."

The case then appears to be this. The *cestui que use* made his will, and the feoffees afterwards made a feoffment of the lands to his *use*; that is, enfeoffed other persons to the use of him. This appears by the reason given for the decision, namely, "because after the feoffment the devisor had the same use which he had before." Now if the case had been as Lord Rosslyn supposed, the devisor would, before the feoffment, have been a mere *cestui que use*, entitled at law to neither *jus in re*, nor *jus ad rem*; when after the feoffment he would have been actually clothed with the legal seisin of the estate. The case therefore seems only a decision, that, where a man devises an equitable estate, a transfer of the legal estate to other persons, in trust for him, is not a revocation of his will. And such is still the rule of law (Doe v. Pott, Dougl. 2d edit. 710.), as well as of equity. Watts v. Fullarton, cited *ibid.*

It may however be objected, that the devisor did not die till after the statute of uses, so that, admitting the force of the foregoing remarks, it still appears that the legal estate was, by the operation of the Act, vested in the devisor. To this it may be answered, that the statute was expressly passed to prevent alienation of estates by devise, although it declared

estate did not pass by the will, permit the heir to take the estate, and acquiesce in this for a long while;

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that wills made before the statute, by persons who were or should be dead before the 1st of May 1536, should not be invalidated by the Act. We must therefore presume that the devisor died before that time; otherwise the will would have been void by virtue of the Act itself, as was expressly decided in a case, where *cestui que use* before the statute devised the use; and then came the statute which transferred the use into possession; and although the testator survived the statute of wills, yet the *operation* of the statute of uses was holden to be a revocation; *because the use was thereby gone.* 1 Rol. Abr. 616. (R.) pl. 2. Putbury v. Trevalian, Dyer, 142, b.

Indeed the statute of uses being mentioned in the case referred to by Lord Rosslyn, shews that his lordship misconceived it; as that statute could not have come in question, if the feoffment had been made to the devisor himself.

Lord Hardwicke seems to have fallen into the same error as Lord Rosslyn (see Sparrow v. Hardcastle, 3 Atk. 798; Ambl. 224.), although he appears to have been struck with the reason given for the decision; in explanation of which he is in Atkins stated to have said, "The use at law was the beneficial and profitable interest, the same as a trust in equity, and which remained in the same manner after the feoffment as before, and the feoffees there granted the dry legal estate to the devisor." In Ambler, his lordship is reported to have said, "Thus the law considers two interests in the land; the legal estate, and the use: now the use remains the same at the making the devise, and at the death

of

while; in which case equity will not relieve him (*t*).

Estates contracted for after the will, will not pass

(*t*) Davie v. Beardsham, 1 Waller, 7 Ves. Jun. 98. Cha. Ca. 39; and see Pigott v.

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of the devisor; and therefore accepting the grant of the feoffees makes no alteration in it."

Lord Hardwicke's attempt to reconcile what he conceived to be the decision in this case, with the reason given for it, evinces the impossibility of making them consistent. According to his argument, the equitable interest was not merged by its union with the legal estate, but still subsisted in the contemplation of law.

In the case of Willet v. Sandford, 1 Ves. 186, Lord Hardwicke classed the different interests in land into three kinds: First, the estate in the land itself; the ancient common law fee. Secondly, the use; *which was originally a creature of equity*; but since the statute of uses, it draws the estate in land to it; so that they are joined, and make one legal estate. Thirdly, the trust; *which the common law takes no notice of*, but which carries the beneficial interest and profits *in this court, and is still a creature of equity, as the use was before the statute.*

This very judicious classification proves (what indeed could not be doubted,) that the true principles of this subject were very familiar to this great master of equity, and that he was led into a false argument by endeavouring to account for a principle which did not exist.

by it (*u*); but the heir at law will be entitled to have them purchased for his own benefit, out of the personal estate of his ancestor (*x*), and that, although he unite in himself the three characters of vendor, heir, and executor (*y*). The estate will, however, be assets in the hands of the heir.

So if the purchaser die intestate, the heir will in like manner be entitled to have the estate purchased for him: and if his ancestor die before the conveyance be executed, the heir may devise, charge, or sell the estate, in the same manner as the ancestor himself might have done (*z*).

Any codicil executed according to the statute of frauds, will amount to a republication of a prior will of lands; and therefore, if a purchaser, previously to a contract, make a general devise of all his lands, and after the contract execute a codicil, according to the statute of frauds; unless an intention appear not to affect it (*a*), the after-purchased

(*u*) Langford v. Pitt, 2 P. Wms. 632; Potter v. Potter, 1 Ves. 437; and see 1 Atk. 573.

(*x*) Milner v. Mills, Mose. 123; and see 2 P. Wms. 632; 3 P. Wms. 224.

(*y*) Coppin v. Coppin, Sel. Cha. Ca. 28. 2 P. Wms. 291.

(*z*) Langford v. Pitt, 2 P. Wms. 632.

(*a*) Lady Strathmore v. Bowes, 7 Term Rep. 482.

estate

estate will pass under the devise in the will, although legacies only are given by the codicil, and no notice is taken of the estate (*b*).

And if a purchaser, previously to a contract, devise all the lands of which he may *die* seised, and make a provision for his heir at law, and afterwards die without republishing his will, and the after-purchased lands devolve on the heir at law; equity would, perhaps, put the heir to his election, and not permit him to take both the descended estate, and the provision made for him by the will.

In purchasing, therefore, of an heir at law who claims an estate conveyed to his ancestor after the date of his will, the purchaser should be satisfied of three points: viz. 1st, That the contract was not entered into by the testator previously to making his will. 2dly, That no codicil was afterwards executed by him, according to the statute of frauds, by which the lands, although not in contemplation, passed. And 3dly, If the will affects to pass all the estates of which the vendor might die seised, that the heir at law does not take any interest under the will.

(*b*) Barnes v. Crowe, 1 Ves. Jun. 486. Piggot v. Waller, 7 Ves. Jun. 98.

From

From the time of the contract, the purchaser, and not the vendor, being owner of the estate in equity, it follows, that if a man devise his estate, and afterwards contract for the sale of it, the devise will thereby be revoked in equity (*c*).

And even where an estate was by a will directed to be sold, and the money to be paid to certain persons, and the testator himself afterwards sold the estate, it was held, that the will was thereby revoked, and that the legatees were not entitled to the money produced by the sale (*d*).

Where an estate is contracted to be sold, it is considered as converted into personalty from the time of the contract, unless the vendor's intention would be thereby disappointed (*e*). And this notional conversion takes place, although the election to purchase rests merely with the purchaser (*f*).

Thus in a case before Lord Kenyon, at the Rolls (*g*), Whitmore demised to Douglas for 7 years,

(*c*) Ryder v. Wager, and Cotter v. Layer, 2 P. Wms. 332, 623; Mayer v. Gowland, 2 Dick. 563; and see 2 Ves. Jun. 436; and Knollys v. Alcock, 7 Ves. Jun. 558.

(*d*) Arnald v. Arnald, 1 Bro. C. C. 401.

(*e*) Foley v. Percival, 4 Bro. C. C. 419.

(*f*) Whitmore's case, 7 Ves. Jun. 436, cited; and Ripley v. Waterworth, 7 Ves. Jun. 425.

(*g*) Whitmore's cases, *ubi sup.*

with

with a covenant, that if the tenant, after the 29th of September 1761, and before the 29th of September 1765, should choose to purchase the inheritance for 3000*l.* Whitmore would convey to him. In 1761, before any election, Whitmore died; and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally. In 1765, before the time mentioned, Waller, who purchased the lease and benefit of the agreement from Douglas, called on Bennett to convey for 3000*l.*; which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the 3000*l.* and interest, and it was decreed accordingly.

The rule established by these decisions must frequently subvert the vendor's intention; to prevent which, where a vendor intends the estate, as between his real and personal representatives, to be deemed real estate, a declaration to that effect should be inserted in the agreement for sale.

Another case in which disputes often arise between the real and personal representatives, is, where a person purchases an equity of redemption; the real representative mostly claiming to have the mortgage money paid off out of the personal estate, and

and the personal representative resisting the demand. If the mortgage money do not form part of the consideration money for the estate, and the purchaser do not, by communication with the mortgagee, clearly take the mortgage debt on himself, as between his heir and executor, it will be considered a charge on the land; the mere covenanting with the mortgagor to pay the debt, will not make it his personal debt; and consequently his personal estate, as between the heir and executor, will only be the auxiliary fund for payment of it (*h*).

In cases of this nature equity always adverts to the intention of the purchaser, and disputes on this subject may therefore be prevented, by the insertion of a short declaration in the purchase deed, whether the personal estate of the purchaser shall or shall not, as between his heir and executor, be the primary fund for payment of the mortgage money.

But (to return to the point under consideration)

(*h*) On this point, see Evelyn v. Evelyn, 2 P. Wms. 659; and the cases in Mr. Cox's note; to which add, Hamilton v. Worley, 2 Ves. Jun. 62; Woods v. Huntingford, 3 Ves. Jun. 128; Buller v. Buller, 5 Ves. Jun. 517; and Waring v. Ward, 5 Ves. Jun. 670; and 7 Ves. Jun. 332.

if

if upon the death of a vendor the court should think the contract ought not to be executed, in such case there is no conversion of real estate into personal in consideration of the court, upon which the right of the executor on the one hand, and of the heir on the other, depends; and therefore the estate will go to the heir at law of the vendor in the same manner as if no contract had been entered into (*i*), and the heir of the purchaser will not be entitled to the money agreed to be paid for the lands (*k*), or to have any other estate bought for him. But if an estate directed to be bought, and settled to uses, is not, or cannot be bought, yet the money must be laid out in other lands to the same uses (*l*).

The foregoing rules therefore, as to the conversion of the estate, apply to those cases only where a court of equity will decree a specific performance; for if equity will not interfere, and the vendee be left to his remedy at law, the rules of law, and not those of equity, must then prevail, and consequently neither the vendor nor his heir

(*i*) Attorney-Gen. v. Day, 1 Ves. 218; Buckmaster v. Harrop, 7 Ves. Jun. 341.

(*k*) See 1 Atk. 573.

(*l*) Whittaker v. Whittaker, 4 Bro. C. C. 31; and see 2 Atk. 369.

would

would be considered as a trustee for the purchaser, but would only be subject to an action for breach of contract.

This leads us to enquire, in what cases a court of equity will decree a specific performance in favor of a purchaser; which, for the purposes of this treatise, may be done under two heads. First, with respect to the vendor. Secondly, with respect to the agreement itself.

First then, if a man seised in fee simple contract for the sale of his estate, and die before the conveyance is executed, his heir at law (as we have already seen) will be decreed to perform the agreement *in specie*

But, if the heir at law be an infant, it appears by some authorities (*m*) that he will not be deemed a trustee for the purchaser within the 7 Ann, c. 19; because, it is said, the Act does not extend to trusts raised by the construction of equity, and consequently no conveyance can be obtained until the infant attain twenty-one.

On examination of the authorities, it will, however,

(*m*) See *ex parte* Vernon, 2 P. Wms. 549; Sikes v. Lister, 5 Vin. Abr. 541. pl. 28; Goodwin v. Lister, 3 P. Wms. 387; Hawkins v. Obeen, 2 Ves. 559; Fearne's *Posthuma*, 239.

ever, appear, that the provisions of the Act have been extended to a much more objectionable case; and that this construction of the Act owes its origin rather to inadvertence than principle.

In the case of Smith v. Hibbard (*n*), a man devised his estate, and afterwards contracted for the sale of it, but died before the contract was carried into execution, leaving an infant heir at law; and, according to the report, Lord Thurlow, *upon consideration*, declared the infant was a trustee within the Act of Ann, and directed him to convey to the purchaser, the will of the vendor not having been proved and established against the heir at law; which, it appears from the original papers in this cause, was owing to the inattention of the solicitor who attended the execution of the commission.

This case, as reported, is a direct authority that an infant heir at law, who by construction of equity is a trustee for a purchaser, is also a trustee within the statute of Ann. The decision being of great importance, and the accuracy of the book in which it is reported being very questionable, I traced the cause in the register's book, and have been favored with a perusal of the original papers in the cause.

(*n*) 2 Dick. 730.

In

In the copy of the decree in this case, and in the decree as entered in the register's book, it is observable, that no notice is taken of the infant; but it merely contains the usual direction, "that all proper parties as the master shall direct, do join in conveying, &c." It appears, however, by the register's book, that upon motion the decree was afterwards varied, by omitting the direction, "that Smith as heir at law should convey, and that all other necessary parties should also convey," and by inserting the usual direction, "that all necessary and proper parties as the master shall direct, do convey:" this proves that the decree made, was as stated in Dickens.

I have not been able to learn whether Lord Thurlow altered his opinion, or upon what ground the decree was varied; but it seems to have been occasioned by the impossibility of obtaining a conveyance from the heir at law, who went to the East Indies very young, and had not been since heard of.

The conveyance was not executed till many years after the decree, when the heir at law, if he was alive, must have been between 30 and 40 years of age; but he was supposed to be dead, and another person joined in the conveyance, as the heir at law of the vendor.

The

The presumption therefore, is, that Lord Thurlow continued of the same opinion, but varied the decree, for the convenience of the parties: and it is to be hoped that his Lordship's decision will be followed in future cases. For, notwithstanding Lord Talbot's doubt (*o*), it has been decided that an infant may convey under the statute of Ann, in pursuance of a decree of the court (*p*). And if the court were, in cases of this nature, to require a bill to be filed, the interest of the infant would be before the court, and could be taken care of. If, on the contrary, Lord Thurlow's decision be not attended to, the most serious inconvenience must frequently ensue, as the purchaser would be at liberty to rescind the contract.

An agreement by a man seised in tail cannot be enforced against the issue in tail, if no fine or recovery was levied or suffered; although the ancestor covenanted for that purpose (*q*), and received part, or even the whole of the purchase-money, and a decree was made against him to levy a fine, or suf-

(*o*) Goodwin v. Lister, 3 P. Wms. 387.

(*p*) Oneby v. Price, Fearne's Post. 239; and Hawkins v. Obeen, 2 Ves. 559.

(*q*) Cavendish v. Worsley, Hob. 203; Ross v. Ross, 1 Cha. Ca. 71; Sayle v. Freeland, 2 Ventr. 350; Jenkins v. Keymes, 1 Lev. 237. *Sed vide* Hill v. Carr, 1 Cha. Ca. 294, *contra*.

fer a recovery, and he died in contempt, and in prison, for not obeying the decree (*r*): the ground of which determinations is, that the issue in tail claim *per formam doni*, from the creator or author of the estate tail; and therefore, though in the power of tenant in tail by a particular conveyance, that not being done, the court cannot take away that right they derive not from the tenant in tail, but from the author of the estate tail (*s*).

A distinction has, however, been taken, where the ancestor is only equitable tenant in tail; and the court will in that case, it is said, relieve against the issue (*t*); because equitable estates tail are mere creatures of the court, and not within the statute *de donis*.

It seems clear that the court would compel a specific performance against equitable issue in tail, where a decree has been made in the ancestor's life-time. But as late authorities (*u*) have settled

(*r*) Powell v. Powell Prec. Cha. 278; Weal v. Lower, 2 Vern. 306, cited.

(*s*) See 1 Ves. 634.

(*t*) Norcliffe v. Worsley, 1 Cha. Ca. 234; Sayle v. Freeland, 2 Ventr. 350.

(*u*) Legatt v. Sewell, 1 P. Wms. 91; Radford v. Wilson, 3 Atk. 815; Botelor v. Allington, 1 Bro. C. C. 72; Burnaby v. Griffin, 3 Ves. Jun. 266; and see 5 Ves. Jun. 12; and 7 Ves. Jun. 112.

that

that an equitable estate tail in freeholds, cannot be barred by a mere deed, but only by a fine or recovery; it seems probable, that the court would not consider such issue to be bound by a mere agreement entered into by their ancestor.

With respect, however, to equitable estates tail in copyholds, they, according to Lord Hardwicke (*x*), may be barred by a mere surrender, a common recovery not being necessary; and it should therefore seem, that a specific performance would be enforced against the equitable issue in tail of copyholds, although no decree were made in the ancestor's life-time.

Where by the custom of a manor (and it is the custom of most manors), a tenant is complete master of his estate, independently of his wife, and can by his own act alone bar her free bench; an agreement by him for sale of his estate, will be enforced against the wife, if he die before it is carried into execution (*y*).

But no agreement for sale of a freehold estate would be carried into execution against a widow

(*x*) Radford v. Wilson, 3 Atk. 815. See Pullen v. Lord Middleton, 9 Mod. 483.

(*y*) Hinton v. Hinton, 2 Ves. 631, 638; Ambl. 277; Brown v. Raindle, 3 Ves. Jun. 256.

entitled to dower. This distinction is founded upon this ground; that a husband has it in his power, during his life, to sell his copyhold estates, and thereby bar his wife's expectancy; but if a wife's right to dower once attaches on a freehold estate, no act of the husband's alone can divest it.

Equity will enforce an agreement by a joint tenant for sale of his share against the survivor, if the articles amount to an equitable severance of the jointure (*z*): and a covenant to sell, though it does not sever the joint tenancy at law, will in equity (*a*).

An agreement by a *feme covert* for sale of her estate, cannot be enforced in equity (*b*).

If, however, an husband agree to convey his wife's estate, he will be compelled to perform the agreement *in specie* (*c*); because, it has been said, it is to be presumed, that the husband, where he covenants that his wife shall levy a fine, has gained her consent for that purpose; but this

(*z*) Musgrave v. Dashwood, 2 Vern. 45, 63. See 2 Ves. 634.

(*a*) See 3 Ves. Jun. 257; Frewen v. Relfe, 2 Bro. C. C. 220.

(*b*) Emery v. Wase, 5 Ves. Jun. 846.

(*c*) Hall v. Hardy, 3 P. Wms. 187; Barrington v. Horn, 2 Eq. Ca. Abr. 17, pl. 7; Morris v. Stephenson, 7 Ves. Jun. 474.

does

does not seem to be the true ground, for although the wife swear by her answer, that she never assented to the agreement, yet the husband will not be let off (*d*). The principle upon which the court proceeds, seems to be this, that if a person undertakes that another shall do a certain act, he is bound to procure him to perform it; and, therefore, where a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age (*e*).

There have been instances of committing the husband to the Fleet, until the wife should convey the estate; but if he should make it appear, that he could not prevail on his wife to join, it seems that he would be discharged, upon placing the vendee in the same situation as if the agreement had never been executed (*f*).

In a late case (*g*) Lord Eldon seemed of opinion, that if this doctrine were perfectly *res integra*, he should hesitate before he would hold

(*d*) Withers v. Pinchard, 7 Ves. Jun. 475, cited.

(*e*) Anon. 2 Cha. Ca. 53.

(*f*) See Note to Hall v. Hardy; Outread v. Round, 4 Vin. Abr. 203, pl. 4; 8 Ves. Jun. 510; and Emery v. Wase, 5 Ves. Jun. 846; and see Sedgwick v. Hargrave, 2 Ves. 57.

(*g*) Emery v. Wase, 8 Ves. Jun. 505.

the husband bound to procure the wife to join. His lordship said, there was difficulty enough to make him pause, before he should follow the two last authorities (*h*); and he was not sure, whether it was not proper to have the judgment of the House of Lords, to determine, which of these decisions ought to bind us.

And it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised, and that equity will eagerly seize on any reasonable ground as a bar to the aid of the court (*i*).

In the case of Baker v. Child (*k*) it was, according to the report, said, *per curiam*, that where a *feme covert*, by agreement made with her husband, is to surrender, or levy a fine, though the husband die before it be done, the court will by decree compel the woman to perform the agreement. But in Daniel v. Adams (*l*), Sir Thomas Sewell said, the note of this case was very loose. And it appears by the Register's book, that the matter was referred to Mr. Justice Rawlinson, and

(*h*) Withers v. Pinchard, 7 Ves. Jun. 475, cited; Morris v. Stephenson, 7 Ves. Jun. 474.

(*i*) See Outread v. Round, 4 Vin. Abr. 203, pl. 4; Emery v. Wase, *ubi sup.*; Daniel v. Adams, Ambl. 495.

(*k*) 2 Vern. 61.

(*l*) Ambl. 495.

no

no decree was made as to this point (*m*), which, if it were now to come before the court, would certainly receive a different determination.

An agreement by a lunatic, cannot of course be carried into a specific execution; but the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a court of equity will decree a specific performance; and the act of God will not change the right of the parties: but if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law (*n*).

It may here be remarked, that if an agent employed to sell an estate, sells it in a manner not authorised by the authority given him, a specific execution will not be decreed against the principal, although the estate be sold for a greater price than he required for it (*o*).

(*m*) See 1 Eq. Ca. Abr. 62, pl. 2.

(*n*) Owen v. Davies, 1 Ves. 82.

(*o*) Daniel v. Adams, Ambl. 495. *Et vide* a *dictum* by Lord Eldon, in Coles v. Trecothick, 1 Smith's Rep. 247. *Sed qu'* if the price exceed the sum required, and no particular reason occur to induce the court to refuse its aid.

Secondly, We are to consider the rules by which equity is guided in granting a specific performance, with reference to the agreement itself.

We shall, however, in the subsequent chapters of this treatise, have occasion to consider rather at large in what cases equity will or will not enforce a specific performance of an agreement for sale of an estate; and it will in this place, therefore, be sufficient to state the *general* rules by which equity is guided in compelling the specific performance of agreements.

The court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law; it depending upon the circumstances. And undoubtedly every agreement, of which there should be a specific performance, ought to be in writing (*p*), certain (*q*), and fair (*r*) in all its parts, and for adequate (*s*) consideration (*t*).

(*p*) *Vide supra*, ch. 3.

(*q*) *Vide* Emery v. Wase, 5 Ves. Jun. 846.

(*r*) Tendring v. Landon, 2 Eq. Ca. Abr. 680; Philips v. Duke of Bucks, 1 Vern. 227; Scott v. Langstaffe, Lofft. 797, cited; and Shirley v. Stratton, 1 Bro. C. C. 440.

(*s*) *Vide infra*, ch. 5.

(*t*) Per Lord Hardwicke. See 1 Ves. 279; and see 3 Atk. 386.

In

In some cases (*u*) it has been holden, that where no action at law will lie to recover damages, equity will not execute the agreement *in specie*; for equity will never make that a good agreement, which is not so by law: but, in other cases (*x*) the contrary has been holden, and relief given accordingly.

Perhaps the following distinctions are authorised by the cases, and will reconcile them.

First, That although the agreement be void at law, a specific performance will be decreed, if there is a clear ground for the interference of equity; and, however unqualifiedly the contrary rule may have been laid down, there is not (that I am aware of) any case clearly entitled to the aid of the court, to which this rule has been successfully opposed as a bar to the relief.

Thus a bond from a woman to her intended

(*u*) The Marquis of Normanby v. Duke of Devonshire, 2 Freem. 217; Dr. Bettesworth v. Dean and Chapter of St. Paul's, Sel. Cha. Ca. 67; and see 2 Eq. Ca. Abr. 15, 24, *notis*; and Fonbl. n. (c) to 1 Trea. Eq. 138, and n. (h) to p. 204, *ibid.*

(*x*) Winged v. Lefebury, 2 Eq. Ca. Abr. 34, pl. 43; Cannel v. Buckle, 2 P. Wms. 243; Norton v. Mascall, 2 Vern. 24; and Hall v. Hardy, 3 P. Wms. 187. See 1 Ves. 258; East India Company v. Donald, 1 Smith's Rep. 213.

husband

husband has been enforced in equity, although void at law by the intermarriage; an agreement for sale of an estate has been decreed against an heir at law, notwithstanding that his ancestor died before the time appointed to convey the estate, and therefore no action would lie against him; and a specific performance has been decreed of an award, although it was void at law; and that very circumstance has since been considered as a good reason for the decree.

Secondly, That where the equity is doubtful, it will be considered whether damages could be recovered at law, and the court will be guided by the result (*y*).

Thus agreements for sale of an estate have (as we have already seen) been decreed on mere letters, which have passed between the parties, but not unless the whole terms of the agreement were therein specified; and even this was going a great way. In the first case, therefore, in which even a trifling omission appeared in the letters, it was natural to pause before the performance of the agreement was decreed; and as the equity was doubtful, to ascertain whether damages could be recovered at law.

The case of the Marquis of Normanby v. the

(*y*) See Hollis v. Edwards, 1 Vern. 159.

Duke

Duke of Devonshire, was, I believe, the first case in which this point occurred; and according to a manuscript note in my possession, Lord Somers called in the two Chief Justices on the point, whether the party on the letters which had passed could have recovered damages at law? And as they were of opinion he could not, Lord Somers dismissed the bill.

Although damages may be recovered at law, yet equity is not, therefore, obliged to decree a specific performance; but the court will judge on the whole circumstances of the case, whether it is such an agreement as ought to be carried into effect; for a jury, upon enquiry, may find very small damages, and then it would be very hard to carry such an agreement into execution in equity, when it would be greatly to the prejudice of the party against whom it should be decreed to be executed (z).

The decreeing a specific performance, is matter of discretion, but it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial (a).

(z) Per Lord Hardwicke, in the case of Lord Middleton v. Wilson, MS. *Vide supra*, p. 44.

(a) Per Lord Eldon. See 7 Ves. Jun. 35; and see 3 Atk. 188.

The

The inserting a proviso, that if either party break the agreement, he shall pay a sum of money to the other, will only be considered in the nature of a penalty (*b*); and consequently a specific performance will be decreed, in the same manner as it would have been in case no such proviso had been inserted.

And although the defendant may wish to forfeit the penalty, yet a specific performance will be decreed (*c*).

If an action is brought for the recovery of the penalty, to entitle the party bringing it to recover, he ought punctually, exactly, and literally, to have completed his part (*d*).

If the purchaser's defence to a bill for specific performance rests merely on the want of title in the vendor, he ought to depend on his answer, and not to file a cross bill to have the agreement delivered up; because the vendor can make no use of the contract, if he has no title (*e*).

Where a purchaser files a bill for a specific performance, he should not make the stewards

(*b*) Howard v. Hopkins, 1 Atk. 371.

(*c*) Hopson v. Trevor, 1 Str. 533; 2 P. Wms. 191.

(*d*) Duke of St. Alban's v. Shore, 1 H. Blackst. 270.

(*e*) Hilton v. Barrow, 1 Ves. Jun. 284.

and

and receivers of the vendor parties to the suit; for although, as we have already seen, the vendor is deemed a trustee for the purchaser, yet this rule does not extend to the agents of the vendor (*f*).

If the abstract be not delivered in time, or objections arise to the title, the vendee may bring an action at law for his deposit; in which case the vendor's remedy (if he can insist on the contract being specifically performed) is to file a bill for a specific performance, and an injunction to restrain the proceedings at law: and the vendor may file his bill for a performance *in specie*, although the vendee may have recovered his deposit at law.

If a purchaser, upon a bill being filed for a specific performance, pay the purchase-money without putting in an answer, and afterwards discover that a fraud was committed in the sale, he is not precluded from bringing an action for damages (*g*).

Where a purchaser brings an action for recovery of his deposit, on account of a defect in the title, it is not sufficient to shew that the title has been deemed insufficient by conveyancers, but he must prove the title bad (*h*).

(*f*) M'Namara v. Williams, 6 Ves. Jun. 143.

(*g*) Jendwine v. Slade, 2 Esp. Ca. 572.

(*h*) Camfield v. Gilbert, 4 Esp. Ca. 221.

If

If either the vendor or vendee refuse to perform the contract, the other may bring an action for breach of contract, or file a bill for a specific performance.

If the purchaser has recourse to equity, and it appears that the vendor has since the contract sold the estate to another person, the court, it seems, will refer it to a master, to enquire what damage the purchaser has sustained; and the sum which shall be found due, together with costs, will be directed to be paid to him (*i*). The usual decree, however, is either a specific performance, or an issue *quantum damnificatus* (*k*).

Where the vendee has paid any part of the purchase-money, he may elect either to affirm the agreement by bringing an action for non-performance of it; or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use.

In an action of this nature, however, the plaintiff cannot recover more than the money paid, although the estate has risen in value; while, on the other hand, if it has experienced a diminution in value, he can only recover the damages he sus-

(*i*) Denton v. Stewart, 1 Ves. Jun. 329, cited.

(*k*) See Fonbl. n. (b) to 1 Trea. Eq. 165.

tained

tained by the estate not being conveyed, that being the only money retained by the defendant against conscience; and therefore the plaintiff, *ex equo et bono*, ought to recover no more. (*l*).

Where a vendee brings an action for non-performance of the contract, and for recovery of his deposit, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he is not bound to state in his particular, any of the objections in point of law arising upon the abstract (*m*).

To entitle a vendor to sustain an action for breach of contract, he must shew what title he has; it is not sufficient to plead that he has been always ready and willing, and frequently offered to make a title to the estate (*n*); but the execution of the title-deeds need not be proved, as that is never required of a vendor (*o*).

Where a contract is not completed merely on

(*l*) Moses v. M'Farlane, 3 Burr. 1005; Dutch v. Warren, *ibid.* 1010, cited; and 1 Str. 406. S. C.

(*m*) Collet v. Thomson, 3 Bos. and Pul. 246.

(*n*) Philips v. Fielding, 2 H. Black, 123; and see Luxton v. Robinson, Dougl. 620.

(*o*) Thomson v. Miles, 1 Esp. Ca. 184.

account

account of objections to the title, and the vendor thinks his title good, he seldom has recourse to equity, but brings an action at law, for the purchase-money.

It becomes therefore material to consider, whether courts of law can take cognizance of equitable objections to a title; because, if they cannot, a purchaser should in such cases file a bill in equity, as he might otherwise be compelled to accept a title, which, although good at law, might be invalid in equity.

The action which a vendor must bring, being founded upon the equitable circumstances of the case between the parties, it seems that a court of law may in such action take cognizance of equitable objections to a title; and if there were any, ought not to permit the plaintiff to recover.

In a recent case (*p*), the court of B. R. would not permit the assignees of a bankrupt to recover money from his trustees, because the deed by which the trusts were created, although perhaps void at law, would probably be restored, and set up again by a court of equity. The court, I am informed, said they would not permit the assignees to recover, as it would be to no purpose. It would

(*p*) Shaw v. Jakeman, 4 East, 201.

be

be merely driving the trustees to the other side of the hall, where they would most likely regain the property.

This case seems in point, for the same observation would apply to a vendor endeavouring to obtain the purchase-money where there were equitable objections to his title: the court would naturally say, *cui bono*, when the purchaser can compel you to repay it in equity.

It seems doubtful whether a court of law will enter into equitable objections to a title, *where the purchaser is plaintiff*. I am aware of only two decisions on this point, and they are at variance: the one decided by Lord Kenyon (*q*), holding that sitting in a court of law, the judges could not take notice of an equitable title; and the other, which was before Lord Alvanley (*r*), deciding that if a purchaser would be liable in equity, he is entitled to recover his deposit at law.

The last case is certainly a very strong authority, because no judge sitting in a court of law could be more averse than Lord Alvanley was, to assume any equitable jurisdiction (*s*). It is, how-

(*q*) Allpass v. Watkins, 8 Term Rep. 516.

(*r*) Elliott v. Edwards, 3 Bos. and Pull. 181.

(*s*) See Johnson v. Johnson, 3 Bos. and Pull. 162.

ever, much to be regretted, that his lordship was not aware of the contrary decision by Lord Kenyon.

Before quitting this subject, it must be remarked, that in agreements for purchase, the covenants are construed according to the intent of the parties; and they are therefore always considered dependent, where a contrary intention does not appear (*t*).

The old law was certainly in favour of the contrary doctrine; but if, as Lord Kenyon observed, the courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader, who had entered into a contract for the sale of an estate, that between the making of the contract and the final execution of it, he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid (*u*).

(*t*) As to where covenants are precedent, and where dependent, see Mr. Serjeant Williams's note (4) to 1 Saund. 320.

(*u*) Duke of St. Alban's v. Shore, 1 H. Black. 280; Goodison v. Nunn, 4 Term Rep. 761; Glazebrook v. Woodrow, 8 Term Rep. 360; and Heard v. Wadham, 1 East, 619.

If,

If, therefore, either a vendor or a vendee, wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreements on his part, or a tender and refusal.

Thus a vendor cannot bring an action for the purchase-money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing (*x*).

And on the other hand, a purchaser cannot maintain an action for breach of contract, without having tendered a conveyance, and the purchase-money.

This last position has, however, been rendered doubtful by some recent *dicta* of the judges (*y*), that it is incumbent on the *vendor* to prepare and tender a conveyance.

This, as a general rule, certainly seems to have prevailed when the simplicity of the common law reigned, and possession was the best evidence of

(*x*) Jones v. Barkley, Dougl. 684. Philips v. Fielding, 2 H. Black. 123.

(*y*) Lord Rosslyn, in Pincke v. Curteis, 4 Bro. C. C. 332; Macdonald, C. B. in Grow-sock v. Smith, 3 Anstr. 877; Lord Kenyon, in Heard v. Wadham, 1 East, 627; and Lord Eldon, in Seton v. Slade, 7 Ves. Jun. 265.

itle; but upon modifications of estates being introduced, which were unknown to the common law, and which brought with them all the difficulties that surround modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel; and it then became usual for him to prepare the conveyance. This practice has continued, and is now the fixed and settled rule of the profession: the rule is, indeed, sometimes departed from, but this seldom happens except in the country, and then it always arises from consent, or express stipulation.

In a late case (*z*), where this point came directly before the Court of Exchequer, it was, in conformity to the present practice of the profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the conveyance.

And in Webb v. Bettel (*a*), the same rule was expressly recognised by Windham J. and denied by no one. He said, "that where a person is to execute a conveyance generally, there the coun-

(*z*) Baxter v. Lewis, 1 Forrest's Rep. Excheq. 61.

(*a*) 1 Lev. 44.

sel

sel of the purchaser is intended to draw it, and then the purchaser ought to tender it."

It is settled, that if a conveyance is to be prepared at the expense of a purchaser, he is bound to tender it (*b*). Now it is admitted, that the expense of the conveyance must be borne by the purchaser, if there be no express stipulation to the contrary (*c*). Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance.

Upon the whole, notwithstanding the recent *dicta* to the contrary, as the point came directly before the Court of Exchequer, in Baxter v. Lewis, and their decision accords with the *uniform practice* of conveyancers, which has always met with the greatest attention in courts of justice (*d*), we may perhaps be warranted in saying, that the purchaser, and not the vendor, ought to prepare and tender the conveyance.

If the purchaser is required by the agreement to prepare the conveyance, it is clear that the vendor may maintain an action, or file a bill, without tendering a conveyance (*e*); and therefore, to prevent all doubt on this point, it would be ad-

(*b*) Seward v. Willock, 5 East, 198.

(*c*) 2 Ves. Jun. 155.

(*d*) See 3 Atk. 208. 1 Term Rep. 772.

(*e*) Hawkins v. Kemp, 3 East, 410.

visable to stipulate in the agreement or conditions of sale, that the conveyance shall be prepared by, and at the expense of, the purchaser. A purchaser must, however, prepare the conveyance, although it is merely declared that the conveyance shall be at his expense (*f*).

But although a purchaser is expressly required to prepare a conveyance, yet if no title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance (*g*).

A writ of *ne exeat regno* does not lie against a purchaser who has not paid the purchase-money, upon his threatening to go abroad, unless the vendor's title has been accepted, and the purchaser has no property here (*h*).

Where a man sells an estate for an annuity, without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond of the purchaser, and a judgment to be entered up against him (*i*).

(*f*) Seward v. Willock, 5 East, 198.

(*g*) S. C.

(*h*) Query. If this does not reconcile the cases—Goodwin v. Clarke, 2 Dick. 497; and Anon. *ibid* note?

(*i*) Remington v. Deverall, 2 Anst. 550.

If

If a person having a right to an estate, purchase it of another person, being ignorant of his own title; equity will compel the vendor to refund the purchase-money with interest, although no fraud appear (*k*).

(*k*) Bingham v. Bingham, 1 Ves. 126.

CHAPTER V.

OF THE CONSIDERATION.

It seems that a court of equity cannot refuse to assist a vendor merely on account of the price being unreasonable (*a*): and a specific performance will certainly be enforced, if the price was reasonable at the time the contract was made, how disproportionable soever it may afterwards become (*b*).

If, however, a man be induced to give an unreasonable price for an estate, by the fraud (*c*), or gross misrepresentation (*d*), of the vendor; or by an industrious concealment of a defect in the

(*a*) Hanger v. Eyles, 2 Eq. Ca. Abr. 689; Hicks v. Hicks, Prec. Cha. 575; Keen v. Stukeley, Gilb. Eq. Rep. 155; 2 Bro. P. C. 396; Charles v. Andrews, 9 Mod. 152; Lewis v. Lord Lechmere, 10 Mod. 503; Savile v. Savile, 1 P. Wms. 745; Adams v. Weare, 1 Bro. C. C. 567; and the cases as to inadequacy of price cited *infra*; and see 2 Vern. 423.

(*b*) Keen v. Stukely, *ubi sup.*

(*c*) See James v. Morgan, 1 Lev. 111.

(*d*) Buxton v. Cooper, 3 Atk. 383.

estate

estate (*e*), he will not be compelled to perform the contract.

Indeed few contracts can be enforced where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter, in every respect, equity will not compel a performance *in specie* (*f*).

It appears to be settled, that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance to a purchaser, where the estate is sold by auction.

In White v. Damon (*g*), however, although the estate was sold by auction, Lord Rosslyn dismissed the bill, merely on account of the inadequate price given for the estate, viz. 1120*l.* and it was worth 2000*l.* but on a rehearing before the present Chancellor, the decree was affirmed upon a different ground; and his Lordship said, he was inclined to say, that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction if the court would not specifically

(*e*) Shirley v. Stratton, 1 Bro. C. C. 440.

(*f*) See the above cases, & Edwards v. Heather, Sel. Cha. Ca. 3.

(*g*) 7 Ves. Jun. 30; see Collet v. Woollaston, 3 Bro. C. C. 228.

fically perform the agreement. And in a subsequent case (*h*) his Lordship expressed the same opinion, and referred to the case of White v. Damon.

It should seem, however, that in a sale by private contract, the court would certainly pay some attention to the adequacy of the consideration (*i*).

And if a contingent consideration (as a life annuity), be given for an estate, and the contract be executory, equity will enter into the adequacy of the consideration (*k*).

Although a purchaser is not bound to acquaint the vendor with any latent advantage in the estate (*l*), yet a concealment, for the purpose of obtaining an estate at a grossly inadequate price, may be deemed fraudulent.

Thus in the case of Deane v. Rastron (*m*), an agreement was made for sale of land at an halfpenny per square yard. The price was in all about 500*l*. the real value 2000*l*. The purchaser went out to

(*h*) See 7 Ves. Jun. 35, note.

(*i*) See Young v. Clerk, Prec. Cha. 538; Barret v. Gomeserra, Bunb. 94; Underwood v. Hithcox, 1 Ves. 279.

(*k*) Pope v. Root, 7 Bro. P. C. 184; Mortimer v. Capper, 1 Bro. C. C. 156; and Jackson v. Lever, 3 Bro. C. C. 605.

(*l*) See 2 Bro. C. C. 420.

(*m*) 1 Anstr. 64.

an

an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The Court of Exchequer said, the desire of concealment would be such a fraud as to void the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price.

Where neither of the parties know the value of the estate at the time the contract is entered into, the inadequacy of the consideration will not be a bar to the relief.

Thus in a case (*n*) where a common was to be inclosed; one man having a right of common, agreed, before the commissioners had made any allotment, or any one could know what it was to be, to sell his allotment for 20*l.* Afterwards it turned out to be worth 200*l.* Sir Joseph Jekyll said, the contract ought to be enforced, as no one could know what the allotment would be; and both parties were equally in the dark: *but it might be different if the circumstances had been known to the plaintiff.*

But, whether an estate is sold by auction, or private agreement, equity will be as vigilant in

(*n*) Anon. 1 Bro. C. C. 158; 6 Ves. Jun. 24, cited.

discovering

discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable (*o*).

A conveyance executed will not, however, be easily set aside on account of the inadequacy of the consideration (*p*). To set aside a conveyance, there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it (*q*). The truth is, that in setting aside contracts, on account of an inadequate consideration, the court proceeds on fraud. In all such cases, however, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to be in the power of the party buying. Unless actual imposition is proved by gross inequality, other circumstances of

(*o*) Emery v. Wase, 5 Ves. Jun. 846; 8 Ves. Jun. 505; Twining v. Morrise, 2 Bro. C. C. 326; and Philips v. Duke of Bucks, 1 Vern. 227.

(*p*) See Dews v. Brandt, Sel. Cha. Ca. 7; Spencer v. Chase, 9 Mod. 29.

(*q*) Per Lord Thurlow, in Gwynne v. Heaton, 1 Bro. C. C. 1; and see Stephens v. Bateman, 1 Bro. C. C. 22; Floyer v. Sherard, Ambl. 18; Heathcote v. Paignon, 2 Bro. C. C. 167, and the cases there cited; and Spratley v. Griffiths, 2 Bro. C. C. 179. N.

fraud

fraud will pass for nothing, the basis must be gross inequality (*r*).

But a conveyance obtained for an inadequate consideration, from one not conusant of his right, by a person who had notice of such right, will be set aside, although no actual fraud or imposition is proved (*s*).

It must be remarked, that we have no certain rule by which the inadequacy of a consideration can be ascertained. Our law, indeed, hath in one instance (*t*) adopted the rule of the civil law; by which no consideration for an estate was deemed inadequate, which exceeded half the real value of the estate; and Lord Nottingham wished the rule universally prevailed in England (*u*).

If it be agreed, that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance *in specie*; but if the referee do not act fairly, or the valuation be

(*r*) Per Lord Thurlow, in Gartside v. Isherwood, 3 Bro. C. C. 558; and see Moth v. Attwood, 5 Ves. Jun. 845; Emery v. Wase, 6 Ves. Jun. 846; and Low v. Barchard, 8 Ves. Jun. 137.

(*s*) Evans v. Llwellyn, 2 Bro. C. C. 150.

(*t*) *Vide* Duke, 177; *et infrà*, Ch. 15.

(*u*) See Nott v. Hill, 2 Cha. Ca. 120; 1 Trea. Eq. 119; Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 12.

not

not carefully made, execution of the contract will not be compelled; especially if there be any other ground upon which the court can fasten, as a bar to its aid (*x*).

By the civil law, also, a price was considered sufficiently certain, if it was to be fixed by a person named, and such person accordingly fixed the sum: but it appears by the institutes (*y*), "*Inter veteres satis abundeque hoc dubitatur, constaretne venditio, an non.*"

A vendee, being equitable owner of the estate from the time of the agreement to purchase it, must bear any loss which may happen to the estate between the agreement and the conveyance; and will be entitled to any benefit which may accrue to the estate in the interim (*z*).

Nevertheless this doctrine, however it may seem to flow from the rules mentioned in the preceding chapter, has never been decided till lately.

For in Stent v. Baily (*a*), the Master of the Rolls said, "If I should buy an house, and before such time as by the articles I am to pay for the same,

(*x*) Emery v. Wase, 5 Ves. Jun. 846; 8 Ves. Jun. 505.

(*y*) 3. 24. 1. For the cases arising out of this rule, *vide* Vin. 674.

(*z*) See 2 Pow. on Contracts, 61.

(*a*) 2 P. Wms. 220.

the

the house be burnt down by casualty of fire, I shall not in equity be bound for the house."

So upon a sale of a leasehold for lives (*b*), previously to the conveyance, one of the lives dropt; and although Lord Keeper Wright decreed a specific performance, yet the report states, that his Lordship seemed to think, that if *all* the lives had been dropt before the conveyance, it might have been another consideration; for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance.

The case of Cass v. Rudele, as it is reported in Vernon (*c*), is an authority against the *dictum* of the Master of the Rolls, in Stent v. Baily; but it appears (*d*), that the case is mistated in Vernon, and that the decree was founded on a good title having been conveyed.

In a late case (*e*), however, where A. had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the in-

(*b*) White v. Nutt, 1 P. Wms. 62.

(*c*) 2 Vern. 280.

(*d*) See 1 Bro. C. C. 157, N.

(*e*) Paine v. Meller, 6 Ves. Jun. 349; and see Poole v. Shergold, 2 Bro. C. C. 118.

surance

surance to expire without giving notice to the vendor; Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party by the contract became in equity the owner of the premises, they were his to all intents and purposes (6).

His lordship's decision exactly accords with the doctrine of the civil law. Indeed it is remarkable, that this very case is put in the Institutes (*f*). "*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi ad huc ea res emptori*

(*f*) 3. 24. 3.

(6) In the 2d vol. of Coll. of Decis. p. 56, are the two following cases:—The peril of a house sold, and thereafter burnt, was found to be the buyer's, though the disposition bore an obligement to put the buyer in possession, because the buyer did voluntarily take possession and rebuild the house, and likewise was infeft before the burning. Hunter v. Wilsons.—A house bought was burnt. The Lords found, that the property being transferred to the buyer, by his being infeft, and the keys being offered to him, the accidental loss must follow the buyer, although there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. Atchison v. Dickson.

tradita

tradita non sit. Itaque si—aut ædes totæ, vel aliqua ex parte, incendio consumpta fuerint—emptoris damnum est cui necesse est, licet rem non fuerit nactus, pretium solvere."

It is hardly necessary to remark, that although the court will enforce a specific performance, notwithstanding the estate is destroyed, yet this will not be done, unless the title be good, or the purchaser has, previously to the accident, waved any objections to it.

The case of Paine v. Meller, may be considered as having also settled, that a purchaser would be entitled to any benefit accruing to the estate after the agreement, and before the conveyance; for Lord Eldon said, "If a man had signed a contract for a house upon that land, which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it."

This also appears to have been admitted in a case (*g*), where A. contracted for the purchase of a reversion, and afterwards the lives dropped before

(*g*) Spurrier v. Hancock, 4 Ves. Jun. 667.

the contract was carried into execution; for, although the court did not decree a specific performance, they proceeded entirely on the laches, and trifling conduct of the purchaser, and never even hinted that the contract should not be performed on account of the lives having dropped.

Indeed this point flows from the *decision* in Paine v. Meller; and it was the rule of the civil law, that the purchaser should benefit by any accretion to the estate before the conveyance: *nam et commodum ejus esse debet cujus periculum est* (*h*).

If a purchaser agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and a payment of the annuity become due, *and he neglect to make or tender it*, and then the vendor die before the conveyance is executed, the purchaser will not be entitled to a specific performance.

Thus in Pope v. Root (*i*), A. had contracted with B. for the sale of an estate to him, in consideration of a life annuity, and the completion of the agreement was delayed by the illness of a mortgagee, who was to have been paid off. Two days after the time mentioned for completing the

(*h*) Inst. *ubi sup.* (*i*) 7 Bro. P. C. 184.

purchase,

purchase, A. met with an accident, and died within a few days. And Lord Chancellor Bathurst dismissed the bill for a specific performance, and the decree was affirmed in *Dom. Proc.* (*k*). By the terms of the contract, the first payment of the annuity became due previously to the death of A. but it was not paid or tendered, and upon that ground only can the decision be considered as an authority.

For in a subsequent case (*l*), where A. contracted to sell an estate to B. for 200*l.* and 50*l.* a year annuity; and two days after the contract was reduced into writing, A. was found drowned; the Lord Chancellor directed an enquiry as to the value of an annuity for the life of A. in order to introduce the question, whether an estate being disposed of for an annuity, which is a contingency, the contract should fall to the ground, if no payment of the annuity shall be made. His lordship said, he thought, if the price were fair, the contract ought not to be cut down, merely because

(*k*) Some have thought that the inadequacy of the consideration influenced this decision. See 2 Pow. on Contracts, 76; but it does not appear, that any inadequacy was actually proved.

(*l*) Mortimer v. Capper, 1 Bro. C. C. 156.

the annuity, which was a contingent payment, never became payable.

The parties in the above cause were so well satisfied with the opinion of the court, that they never brought it back for further directions (*m*).

So in a later case (*n*) (7), where A. sold an estate by auction in consideration of a life annuity, the

(*m*) See 3 Bro. C. C. 609.

(*n*) Jackson v. Lever, 3 Bro. C. C. 605.

first

(7) In this case the annuity was to be secured on the estates, and as a further security, the purchaser was to give *good and sufficient landed security* to the satisfaction of the vendor's counsel; and on the authority of Crosley v. Arkwright, 2 Term Rep. 603, it was contended, that the agreement ought to have been memoralised, as the security given might not be within the exceptions of the Annuity Act (17 Geo. III. c. 26.)

The case of Crosley v. Arkwright, which was decided by Buller and Grose, Justices, determined, that where goods are sold in consideration of a sum of money, and of an annuity, a memorial of the annuity ought to be enrolled.

This decision seems to have been made without sufficiently adverting to the intended operation of the Annuity Act, which was to *provide against the pernicious practice of raising money by the sale of life annuities*. The enacting part, indeed, is general; but it seems to be admitted, that where the not restraining the generality of the enacting clause will be attended with inconvenience, the preamble shall restrain.

Besides,

first payment to be made on the 25th of December 1787; but in case he should die before the 29th

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Besides, the statute requires, that the consideration shall be in money only, and although it afterwards mentions notes, yet they are considered as money.

In Crespigny v. Wittenoom, 4 Term Rep. 790, an annuity granted in consideration of the grantee giving up his business to the grantor, was holden not to be within the Act. Lord Kenyon, in speaking of annuities granted in consideration of money, or of notes, said, "In both these cases the annuity is granted in consideration of *something paid* to the grantor, *and no decision has extended the provision of the first clause beyond those two cases.*" And Buller and Grose, Justices, were of the same opinion, and never even mentioned their former decision.

Again, in Hutton v. Lewis, 5 Term Rep. 639, it was adjudged, that an annuity granted in consideration of the grantee resigning his situation as master of an academy in favour of the grantor, and granting a lease of the academy, and assigning the furniture, &c. was not within the Act, although the *grantee*, at the time of the grant, agreed to lend the grantor a sum of money at interest, if he could not pay for the furniture, &c. In this case Lord Kenyon and Grose, Justices, were clearly of opinion, that the Act only extended to *money considerations*.

In neither of the two foregoing cases was the case of Crosley v. Arkwright mentioned; but the principles established by those cases clearly over-ruled the decision in this case, and restored the true construction of the Act. Per-

29th of September 1787, the contract should be void. A. died on the 1st of February 1788, after a sudden and short illness of only two days; and owing to some delays, the conveyances were not executed.

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haps, however, it may be said, that the case of Crosley v. Arkwright is distinguishable from the other cases, because a sum of money was paid by the grantor; but this very circumstance affords an additional reason why the statute should not extend to such a case. It is, indeed, just the reverse of what the legislature intended to guard against. Instead of the grantor *raising money* by the sale of a life annuity, he actually *paid a sum of money*, besides the annuity which he granted. In no light can such an annuity be considered within the Act, as it is expressly declared, that if any part of the consideration is in goods, the annuity shall be void.

Although in Jackson v. Lever, a specific performance was decreed, which was deciding that a memorial was not necessary, yet this seems to have proceeded from the contract being merely an agreement for an annuity. If the case of Crosley v. Arkwright, be not law, it would seem to follow, that in Jackson v. Lever, the annuity would not have been within the Act, had it even been actually granted and secured on leaseholds.

How can the grantor be said to be raising money by the sale of a life annuity, when he merely obtains an estate for it? The argument in favour of this doctrine is, that the grantor obtains money's-worth for his annuity, but as well the words as the spirit of the Act clearly exclude such an interpretation

executed. The quarter's payment due at Christmas was tendered to the vendor's agent by the purchaser, a few days after it became due; but the agent declined receiving it, saying, that the conveyance would be soon completed, and that it was not necessary for the purchaser to make such payment in the mean time. On the first hearing, Lord Thurlow said, he did not see that if an annuity was contracted for, why the consideration should not be paid. It was, he said, objected, that the contract could not be carried into execution *modo et forma*, and that had great weight where there had been no payment. His lordship afterwards made his decree for a specific performance, on payment of the arrears of the annuity, the consideration for the purchase of the estate.

The case of Paine v. Meller, also bears on this point. Lord Eldon, in delivering judgment, said, that as to the annuity cases, and all others, the true answer had been given; that the party has

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interpretation of it. The legislature looked at money considerations only, and expressly guarded against money's-worth being deemed a consideration within the Act. Upon the whole it is submitted to the learned reader, that any annuity *bond fide* granted for *any other* than *a money consideration*, is not within the Act.

the thing he bought, *though no payment may have been made*; for he bought subject to contingency (*o*).

Upon the whole it seems, that if no payment of the annuity has become due, or if a payment has become due, and has been made or tendered, a specific performance will be enforced.

These decisions do not infringe upon that of the House of Lords, in Pope v. Root, and reduce the rules on this subject to an equitable and uniform standard; for the only case in which a purchaser cannot require the assistance of equity, is where he has by laches forfeited his right to its aid, namely, where a payment became due, and he neglected to pay or tender it.

These cases suggest two observations:

1. That in agreements for the purchase of houses, some provision should be made for their insurance, until the completion of the contract.

2. That in agreements for purchase, where the consideration is an annuity for the life of the vendor, it should be expressly declared, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although

(*o*) And see an observation by his lordship, in Coles v. Trecothick, 1 Smith's Rep. 233.

a payment

a payment of the annuity shall not have become due, or having become due, shall not have been made or tendered; but that on the contrary, the purchaser shall be entitled to a conveyance, on payment of the annuity up to the death of the vendor.

CHAP.

CHAPTER VI.

OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE A VENDOR HAS NOT THE INTEREST HE PRETENDED TO SELL; AND OF DEFECTS IN THE QUALITY AND QUANTITY OF THE ESTATE.

WHERE a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as for example, if it was for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for the sale: and the vendor offering to make an allowance *pro tanto* will make no difference; it is sufficient for the plaintiff to say, it is not the interest which I agreed to purchase (*a*).

(*a*) Farrer v. Nightingal, 192; Thomson v. Miles, 1 2 Esp. Ca. 639; and see Esp. Ca. 184. Hearn v. Tomlin, Peake's Ca.

But,

But, notwithstanding the vendor has a different interest to what he pretended to sell, equity will in some cases compel the purchaser to buy it.

Thus, although the vendor may not be entitled to the estate for the number of years he contracted to sell; yet, if the deficience were not great, equity would certainly decree a performance of the contract at a proportionate price.

So where an estate is sold by auction, or before a master, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest,; and will allow him a compensation *pro tanto*.

Thus in Poole v. Shergold (*b*), a man became the purchaser of several lots of an estate, to two of which no title could be made. And upon the master's report, Lord Kenyon said, he must take it for granted, the two lots were not so complicated with the others, as to entitle the purchaser to resist the whole. And therefore decreed a specific performance *pro tanto*.

But if a title cannot be made to a lot which is complicated with the rest, the purchaser will not

(*b*) 2 Bro. C. C. 118.

be

be compelled to accept the lots to which a title can be made.

Thus in Poole v. Shergold, Lord Kenyon said, if a purchase was made of a mansion-house in one lot, and farms, &c. in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract.

His lordship seems afterwards to have gone a step further, and to have been of opinion, that such a contract ought not in any case to be *enforced* against a purchaser.

For sitting in a court of law (c) he held, that the performance of a contract for the sale of some houses ought not to be compelled, as a title could not be made to all the houses bought; and this, notwithstanding they were sold in separate lots. He said, when a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller therefore shall not, in case of any defect in his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From

(c) Chambers v. Griffiths, 1 Esp. Ca. 149.

such

such a doctrine much injustice might result, as the part to which a seller could not make a title, might be so circumstanced, that without it the other parts would be of little, perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased.

He added, that a case under circumstances precisely similar to the present, had been decided before him, when Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was now delivering; but that he at the Rolls had over-ruled Sir Thomas Sewell's determination, with the general approbation of the bar.

And the Court of Exchequer appear to have been of the same opinion as Lord Kenyon. For in a case (*d*) where a person purchased several lots of an estate sold under a decree of the court, and the biddings were afterwards opened as to one lot; the court were of opinion, that he had an option to open the biddings as to the rest of the lots.

(*d*) Boyer v. Blackwell, 3 Anstr. 657.

In

In a late case (*e*), in which most of the authorities on this head were cited, the cases of Chambers v. Griffiths, and Boyer v. Blackwell, were not noticed; but I learn that Lord Eldon since mentioned from the bench, that he had met with the case of Chambers v. Griffiths; and he desired it to be understood, that he was not of the same opinion as Lord Kenyon.

The rules laid down in Poole v. Shergold, must therefore still be considered the law of the court.

It is indeed remarkable, that in Chambers v. Griffiths, Lord Kenyon should have overlooked his decision in Poole v. Shergold; more especially as it obviated the objections which he made to a partial execution of a contract, for purchase of several lots of an estate.

It is very clear from the report of Chambers v. Griffiths, that Lord Kenyon intended the doctrine there laid down, to apply as well to an action in a court of law, as to a suit in a court of equity. Lord Eldon, in dissenting from this case, must however, it is conceived, be understood only to mean, that equity may partially execute such a contract; because, unless under very particular circumstances, a purchase of several lots of an

(*e*) Drewe v. Hanson, 6 Ves. Jun. 675.

estate,

estate, must at law be deemed an entire contract; and at law neither a vendor can, on an entire contract, recover part of the purchase-money, where he cannot make a title to the whole estate sold; nor would a purchaser be suffered in a court of law to say, that he would retain all of which the title was good, and vacate the contract as to the rest: such questions being subjects only for a court of equity (*f*).

Where an estate is sold in one lot, either by private contract, or public sale, and the vendor has not a title to the whole estate; yet if the part to which he has a title was the principal object of the purchaser, equity will compel him to take it at a proportionate price.

Thus in a case (*g*) before Sir Thomas Sewell, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not obtain the wharf; as it appeared that the house was the principal object of his contract.

And in the late case of Drewe v. Hanson (*h*), which arose upon the sale of an estate, together

(*f*) Johnson v. Johnson, 3 Bos. & Pull. 162. 7 Ves. Jun. 270, cited.

(*g*) See 6 Ves. Jun. 678;

(*h*) 6 Ves. Jun. 675.

with

with the valuable corn and hay tythes of the whole parish, it appeared, that the principal object of the purchaser was the corn tythe, and that half the hay tythe belonged to the vicar, and the other half was commuted for by a payment of 2 *l.* per annum, the nature of which did not appear. Upon the facts, as they then appeared, Lord Eldon would not give judgment, but he seemed clearly of opinion, that the hay tythe, if not of great extent, or of such a nature as to prejudice the corn tythe, was a subject for compensation: but otherwise not, as the purchaser would not get the thing which was the principal object of his contract.

It appears, however, from the last case, that although the purchaser can obtain what was the principal object of his contract, yet he will not be compelled to take it, if the part which he cannot obtain is likely to injure it.

If a purchaser, with notice of a defect in the title to a part of the estate which is complicated with the rest, or which is the principal object of his contract, take possession of the estate, and prevent the vendor making a title, he will be compelled to perform the contract, notwithstanding that he insisted upon the objection at the time he entered.

entered (*i*). A deduction from the price will however be allowed him, although the situation of the land will not perhaps be taken into consideration.

A purchaser will not be compelled to take an undivided part of the estate contracted for.

Therefore if a man contract with tenants in common, for the purchase of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the share of the deceased. But the purchaser may compel the survivors to convey their shares, although the contract cannot be executed against the heir of the deceased (*k*).

Nor will a purchaser be compelled to take a leasehold (8) or copyhold (*l*) estate, where he has contracted for a freehold (9).

(*i*) See Calcraft v. Roebuck, 1 Ves. Jun. 226.

(*k*) Attorney-General v. Gower, 1 Ves. 218.

(*l*) See 4 Bro. C. C. 497; 1 Ves. Jun. 226; and Twining v. Morris, 2 Bro. C. C. 316; and Sir Harry Hicks v. Philips, Prec. Cha. 675.

But

(8) Although a purchaser cannot be compelled to take an estate held for a term of years, however long it may be, where he has contracted for a fee, yet a willing purchaser may safely accept it; and by the following means may gain

But if an estate is sold as copyhold, and represented as equal in value to freehold, it seems the vendor will be compelled to perform the contract, although the estate prove to be actually freehold (*m*).

(*m*) Twining v. Morris, 2 Bro. C. C. 316.

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the fee. In the first place, the term should be assigned to a trustee, then a feoffment of the lands should be executed; and after the feoffment, the trustee to whom the term is assigned, should declare that he will stand possessed of the lands during the term, in trust to attend the inheritance according to the uses created by the feoffment. This mode will give the purchaser a good title against all persons except the lessor, or reversioner; and as he can claim no title till the expiration of the term, the title will be substantially good against all the world, if the term be a long one. At the same time it is evident, that there are certain privileges attached to a freehold estate, which could not be claimed by the purchaser in derogation of the rights of the reversioner. Indeed this mode of making a title should only be resorted to, where it is not known who is the lessor, or reversioner

(*p*) In the case of Sir Harry Hicks v. Philips, on account of the unreasonable price at which the estate was sold, a specific performance was refused, although the vendor offered to procure an infranchisement of the copyholds; but this case cannot be considered as an authority, except on the ground of the price being unreasonable, as equity will in ordinary cases grant the vendor time to procure the fee. See *infra*. Ch. 8.

If

If a vendee proceed in the treaty for purchase, after he is acquainted with the nature of the tenure, and do not object to it, he will be bound to complete his contract, and cannot claim any compensation on account of the difference in value.

Thus where an estate was sold as a freehold, with a leasehold adjoining (*n*), and it turned out on examination that 62 acres were leasehold, and only 8 freehold; yet as the purchaser proceeded in the treaty after he was in possession of this fact, he was held to have waved the objection.

And even if a purchaser do object to the tenure, yet if he proceed in the treaty, it seems he will be compelled to take the estate, on being allowed a compensation (*o*).

In the case of Wirdman v. Kent (*p*), upon a bill filed by vendors for a specific performance, it appeared that part of the lands sold to the purchaser, had been previously sold to one Pavey; a specific performance was however decreed, and, as to the lands terriered to the defendants, but which had been sold to Pavey, that the plaintiffs should procure Pavey to release them to the de-

(*n*) Fordyce v. Ford, 4 Bro. C. C. 494; and see 6 Ves. Jun. 679.

(*o*) See Calcraft v. Roebuck, 1 Ves. Jun. 226.

(*p*) 1 Bro. C. C. 140.

fendants, *or convey a like quantity of land, of equal value, to the defendants.*

The particular circumstances of this case do not appear in the report, but it must be presumed, that the land sold to Pavey was not the object of the purchaser; and that other land in the neighbourhood, of equal value, would suit him as well.

Where the estate itself can be obtained, the court will, on the doctrine of compensation, enforce a specific performance, although the estate be charged with an incumbrance; and that, notwithstanding the purchaser's object might be to obtain an estate, free from that particular incumbrance.

Thus in a case (*q*) where a man had articled for the purchase of an estate tythe-free, but which afterwards appeared to be subject to tythes; Lord Thurlow decreed a specific performance, although the purchaser proved, that his object was to buy an estate tythe-free.

This however, to use Lord Eldon's words (*r*), is a prodigious strong measure in a court of equity to say as a discreet exercise of its jurisdiction, that the contract shall be performed, the defendant swearing, and positively proving, that he would

(*q*) Lord Stanhope's case, 6 Ves. Jun. 678, cited.

(*r*) See 6 Ves. Jun. 679.

have

have had nothing to do with the estate if not tythe-free. And it seems clear, that equity would not assist a vendor, if he was aware of the incumbrance at the time he entered into the contract for sale.

To guard against the rules established by the foregoing decisions, an express declaration should be inserted in all agreements for sale, that if a title cannot be made to the whole estate, the purchaser shall not be bound to perform the contract *pro tanto*. And a similar provision should be made where an estate is bought free from tythes, or with any other collateral benefit, which may be the purchaser's principal object.

If a lease has been granted by the vendor of the estate sold, which is void by force of a statute, the court will not, on the request of the purchaser, consider the lease as valid, and allow him a compensation in respect of it (*s*).

With respect to defects in the quality of the estate (*t*):—In most cases the rule "*caveat emptor*" applies, and therefore, although there be defects in the estate, the purchaser can have no relief.

Thus, where a meadow was sold without any notice of a footway round it, and also one across it,

(*s*) Morris v. Preston, 7 Ves. Jun. 547.

(*t*) See the Introductory Chapter.

which of course lessened its value; Lord Rosslyn decreed a specific performance with costs, as *he could not*, he said, *help the purchaser who did not choose to inquire* (*u*).

And here we may mention a case (*x*), where the subject of the contract was a house on the north side of the River Thames, supposed to be in the county of Essex, but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex; yet he was compelled to take the house.

Where, however, the defect is a *latent* one, and the purchaser cannot by the greatest attention discover it, if the vendor be aware of it, and do not acquaint the purchaser with the fact, he may set aside the contract at law (*y*); and equity will not enforce a specific performance (*z*).

But the ground and basis of an action in a case of this nature, for recovery of a deposit, where the

(*u*) Oldfield v. Round, 5 Ves. Jun. 508.

(*x*) Shirley v. Davies, in the Exchequer, 6 Ves. Jun. 678, cited.

(*y*) Mellish v. Motteux, Peake's Ca. 115.

(*z*) Oldfield v. Round, 5 Ves. Jun. 508.

contract

contract is *in fieri*; or of damages, where the contract is actually executed, is the *scienter*; and therefore, if the vendor was not aware of the defect, he will not be answerable for it. Nor will trifling defects be sufficient foundation for such an action.

Thus in a case (*a*) where a purchaser brought an action against a vendor, to recover damages for having sold him a house, knowing it had the dry rot; it appeared, that the house was situate in a clayey soil, and that the floor lay near the ground, by which some of the timbers had rotted; but the vendor was not aware of the defects, and the purchaser was non-suited. Lord Kenyon said, the circumstances that had been proved in this case might be described by a word that was used by one of the witnesses; they were mere *bagatelles*. If these small circumstances, his Lordship added, were to be the foundation of an action, every house that was sold would produce an action. If a broken pane of glass that might be found in a garret window, perhaps, had not been described by the seller, it would be the ground of an action. If he was to consider himself as a witness in the cause, he could say he had met with something of this kind,

(*a*) Bowles v. Atkinson, B. R. MS.

and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. Besides, there was no imposition, no *mala fides*, in this case.

Although a defect be *patent*, and the purchaser might have discovered it; yet if, during the treaty, the vendor *industriously* conceal the fact, equity will not assist him.

Thus upon a suit for specific performance, the defence was, that the estate was represented to the defendant as clearing a neat value of 90*l. per ann.* and no notice was taken to him of the necessary repair of a wall to protect the estate from the River Thames, which would be an outgoing of 50*l. per ann.* And it appearing, upon evidence, that there had been an industrious concealment of the circumstance of the wall, during the treaty, the Lord Chancellor dismissed the bill, but without costs (*b*).

With respect to defects in the quantity of the estate:—If a purchaser of an estate thinks he has purchased *bona fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only, which he intended

(*b*) Shirley v. Stratton, 1 Bro. C. C. 440.

to

to give for the whole; or that the other shall be obliged to sell the whole, for what he intended to be the price of part only. Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying, any more than the seller imagined he was selling, the part in question, then a pretence to have the whole conveyed, is as contrary to good faith on his side, as a refusal to sell would be in the other case (*c*).

If the vendor sell the estate at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey (*d*).

And if lands are shewn to a purchaser as part of his purchase, he will be entitled to them, although expressly excepted in his conveyance by name, provided he did not know them by that name (*e*).

So if a man purchase an estate by a particular, and in the conveyance part of the land is left out,

(*c*) Per Lord Thurlow. See pl. 1. 1 Ves. Jun. 211.

(*d*) Sir Cloudesley Shovel v. Bogan, 2 Eq. Ca. Abr. 688.

(*e*) Oxwick v. Brockett, 1 Eq. Ca. Abr. 335.

equity

equity will relieve him (*f*); but it must be clear that he did purchase by the particular, because it is not a writing within the statute of frauds; and therefore, unless that be the case, or the agreement can be otherwise proved, the court cannot relieve (*g*).

On the other hand, the court will equally relieve a vendor, where more land has passed than was contracted for.

In an early case (*h*), this relief was denied; because the defendant was a purchaser upon valuable consideration.

But it is now clear, that if land be expressly conveyed, or pass by general words, which was not mentioned in the particular by which the purchase was made, or was not intended to be conveyed, the purchaser will be decreed to re-convey it (*i*).

And where a purchaser took a conveyance of an estate from his own instructions, he was held not to be entitled to lands answering the general description in the advertisements of sale, but which

(*f*) Prec. Cha. 307, *arguendo*.

(*g*) Cass v. Waterhouse, Prec. Cha. 29; and see Nelson v. Nelson, Nels. Cha. Rep. 7.

(*h*) Clifford v. Lawton, Toth. 83.

(*i*) Tyler v. Beversham, Finch 80; 2 Cha. Ca. 195.

were

were not included in his conveyance, nor in a more particular description from which he prepared his instructions (*k*).

Lastly, it must be remarked, that where the lands are mentioned to contain so many acres *by estimation*; if there be a small portion more than the quantity, the vendor cannot recover it: and if there be a small quantity less, the purchaser can obtain no compensation in respect of the deficiency (*l*).

(*k*) Calverly v. Williams, 1 Ves. Jun. 210.

(*l*) Twyford v. Warcup, Finch, 310; see Marquis of Townsend v. Stangroom, 6 Ves. Jun. 328.

CHAP.

CHAPTER VII.

OF THE TITLE A PURCHASER MAY REQUIRE.

A PURCHASER has a right to require a title commencing at least 60 years previously to the time of his purchase; because no estate in fee simple, created or taking effect within that period, would be barred by the statute of limitations (*a*).

In Paine v. Meller (*b*), Lord Eldon seemed of opinion, that an abstract not going further back than 43 years, was a serious objection to the title.

Even 60 years are not sometimes sufficient. For instance; if it may reasonably be presumed from the contents of the abstract, that estates tail were subsisting, the purchaser may demand the production of the prior title. The statute of limitations cannot in such case be relied on; remainder men having distinct and successive rights, upon which the statute can only begin to operate as they fall into possession.

So, if an abstract begin with a conveyance by a

(*a*) 32 Hen. VIII. c. 2. (*b*) 6 Ves. Jun. 349.
Vide Post.

person

person who is stated to be heir at law of any person; the purchaser may require proof of the ancestor's intestacy.

Again, if an abstract commence with a fine or recovery to bar an entail, the purchaser may call for the instrument by which the entail was created, to enable him to ascertain whether it was or was not effectually barred.

To pursue this point is impracticable, so numerous are the cases in which counsel are compelled to require the production of the prior title.

Under this head we must consider the much agitated point, whether a purchaser of a leasehold estate can insist upon the production of the lessor's title.

A lessee is a purchaser *pro tanto*, and it should therefore seem that *he* is not only entitled to call upon the lessor for an inspection of his title, but would not meet with any favor if he neglected to do so; for no one's misfortune is so much slighted by the courts as his, who buys a thing in the realty, and does not look into the title (*c*).

In Keech v. Hall (*d*), Lord Mansfield appears to have taken for granted, that a lessee has a right

(*c*) See Roswell v. Vaughan, Cro. Jac. 196; and Lysney v. Selby, 2 Lord Raym. 1118.

(*d*) Doug. 21.

to

to examine the title-deeds; and not even a *dictum* to the contrary, has ever been advanced.

The better opinion therefore appears to be, that a lessee, previously to accepting a lease, may require the lessor to produce his title; from which it seems to follow, that a purchaser from the lessee would not be compelled to complete his purchase, unless the title of the lessor was produced; for, as Lord Mansfield said (*e*), if one must suffer, it is he who has not used due diligence in looking into the title. Indeed, it is impossible to suppose that equity would, on any other terms, compel a purchaser of a leasehold to complete his contract.

The practice of the profession is always to call for an abstract of the lessor's title, but a lessee is not often able to comply with the demand. At the time the lease is granted, the title is rarely investigated, or even thought of; and a lessor cannot be advised to voluntarily submit his title to the examination of strangers. As my Lord Eldon remarked (*f*), the Newcastle case is a good lesson upon this subject of production. The corporation produced their charters to satisfy curiosity; some persons got hold of them; and the consequence was, the corporation lost 7000 *l.* a year.

(*e*) Doug. 23. (*f*) 8 Ves. Jun. 141.

If

If the vendor be responsible, purchasers frequently dispense with the production of the lessor's title, on receiving general and unqualified covenants from the vendor, for the validity of the lease, and his right to assign, &c. (*g*)

It must, however, be remarked, that equity would, perhaps, compel a purchaser of a leasehold estate, held under the Duke of Bedford, the Duke of Portland, Mr. Portman, or any other person under whom or whose family considerable property has long been holden undisturbed, to accept the title, although the lessor's title could not be produced; because there is little, perhaps no danger, in taking such a title; and it would be almost impossible, and very impolitic, for such persons to furnish their numerous lessees with abstracts of their family titles (*h*).

At the same time, this can by no means be relied on; for the lease might have been granted under a power. Besides, without an abstract of the title, a purchaser cannot even ascertain that the lessor had not mortgaged the estate previously to granting the lease, in which case (as against the mortgagee) the lessee, and consequently any pur-

(*g*) See 2 Bos. and Pull. 23. (*h*) See Lyddal v. Weston, stated *infra*.

chaser

chaser from him, would be a mere tenant at will (*i*); and his only remedy would be, either to redeem, or to bring an action on the lessor's covenant for quiet enjoyment.

If a purchaser of a leasehold estate had notice, at the time he entered into the contract for purchase, of the vendor's inability to produce the lessor's title, he would not afterwards be allowed to insist on its production. Wherever, therefore, a lessee, who has not an abstract of the lessor's title, intends to sell, this circumstance should be mentioned in the particulars of sale, if sold by auction; or in the agreement, if sold by private contract.

To enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion (*k*); for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate, which it cannot warrant to him (*l*). It hath, therefore, become a settled and invariable rule, that a purchaser shall

(*i*) Keech v. Hall, Dougl. 21.

(*k*) See 2 Ves. 59.

(*l*) Heath v. Heath, 1 Bro. C. C. 147.

not

not be compelled to accept a doubtful title (*m*): neither will he be forced to take an equitable title (*n*): nor will a case be directed to the judges as to the title, unless the purchaser be willing that it should (*o*): and even if a case is directed, and the judges certify in favour of the title, yet equity will not decree a specific performance, if the judges' certificate be couched in doubtful terms (*p*).

So there are many cases in which a jury will collect the fact of legitimacy from circumstances, in which it might be attended with so much reasonable doubt, that equity would not compel a purchaser to take it, merely because there was such a verdict. The court ought to weigh, whether the doubt is so reasonable and fair, that the property is left in his hands not marketable (*q*).

(*m*) Marlow v. Smith, 2 P. Wms. 202; Mitchel v. Neale, 2 Ves. 679; Shapland v. Smith, 1 Bro. C. C. 75; Cooper v. Denne, 4 Bro. C. C. 80; 1 Ves. Jun. 565, S. C.; Crewe v. Dicken, 4 Ves. Jun. 97; Roaks v. Calland, 5 Ves. Jun. 186; Roaks v. Kidd, *ibid.* 647.

(*n*) Cooper v. Denne, *ubi sup.*; and see 2 Ves. Jun. 100; and *infra.*

(*o*) Roaks v. Kidd, *ubi sup.* Omerod v. Hardman, 5 Ves. Jun. 722.

(*p*) Sheffield v. Lord Mulgrave, 2 Ves. Jun. 526.

(*q*) Per Lord Eldon. See 8 Ves. Jun. 428.

It hath been before observed, that a purchaser will not be compelled to take an equitable title; but this rule does not extend to estates sold before a master, under the decree of a court of equity.

For in this case, although the legal estate is outstanding, and cannot be immediately got in, yet if the person seised of the legal estate is a party to the suit, the court will compel the purchaser to accept the title, and will decree generally that the legal tenant shall convey, and that the purchaser shall in the mean time hold and enjoy.

And even where the legal estate is vested in an infant, the court will compel the purchaser to complete his contract, on the usual decree, that the infant shall convey when he comes of age, unless he then shews cause to the contrary; and that the purchaser shall in the mean time hold and enjoy.

Thus in a case (*r*) where, upon sale of an estate before a master, in pursuance of a decree under Lord Waltham's will, the purchaser objected to the title, on the ground of the legal estate being in an infant, Lord Rosslyn without the least hesitation compelled the purchaser to take the title; making his decree for the infant to convey in the

(*r*) Ch. MS.

usual

usual form: because as the purchaser bought under the decree, he was bound to accept such a title as the court could make him (*s*).

But although the court will compel a purchaser *under a decree* to accept a title of this nature; yet if he sell the estate, the court will not enforce a specific performance against the second purchaser.

This was also decided by Lord Rosslyn. The purchaser in the last-mentioned case, sold the estate to a person, who objected to the title upon the same ground as he had objected to it, and refused to complete the contract. The first purchaser very confidently filed a bill for a specific performance, but Lord Rosslyn dismissed it; because such second purchaser *did not buy under the decree*, and therefore was not compellable to accept an equitable title.

The reason why a purchaser under a decree is compelled to take an equitable title, seems to be this, that the court has bound the right of the party in whom the legal estate is vested, and will not permit him to take advantage of it. This,

(*s*) But note, a purchaser under a decree will not be compelled to take a *doubtful* title. See Marlow v. Smith, 2 P. Wms. 198; and Shaw v. Wright, 3 Ves. Jun. 22.

 however,

however, is not the case where the legal estate is in an infant; as it makes part of the decree, that he shall convey when he comes of age, *unless he then shews cause to the contrary.*

In favour of the rule, by which a purchaser under a decree is compellable to take an equitable title, it may be said, that it facilitates sales under the decrees of the court; but the injustice of it is too glaring. The decree of a court of equity acts *in personam*, and not like a judgment at law *in rem*; and it is possible, that the court may never be able to compel the person seised of the legal estate, to convey it to the purchaser.

Although, as we have seen, a purchaser cannot be compelled to take a doubtful title, yet he will not be permitted to object to a title on account of a mere probability; because a court of equity, in carrying agreements into execution, governs itself by a moral certainty: it being impossible, in the nature of things, there should be a mathematical certainty of a good title.

Therefore *suggestions* of old entails, and doubts what issue persons have left, whether more or fewer, are never allowed to be objections of such force as to overturn a title to an estate (*t*).

(*t*) See 2 Atk. 20, per Lord Braybroke v. Inskip, Lord Hardwicke; and see 8 Ves. Jun. 417.

Where

Where a vendor is tenant in tail, with reversion to himself in fee, and the reversion has vested in different persons, a common recovery is generally required by a purchaser; because that *bars* the remainder, while a fine lets it into possession, and thereby subjects the estate to any incumbrance which may affect the reversion. But unless some incumbrance appear, or the title to the reversion is not clearly deduced, the court will refuse to compel a vendor to suffer a recovery, on account of the mere probability of the reversion having been incumbered.

Thus in a late case (*u*), upon an exception to the master's report in favour of the title, the objection to the title was, that Elizabeth Baker ought to join in a recovery; the title being derived from John Paine, who, in 1693, limited the estate to the use of himself for life; remainder, subject to a term, to uses which never arose; remainder, to his daughters in tail; remainder, to himself in fee. Under these limitations Elizabeth, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his

(*u*) Sperling v. Trevor, 7 Ves. Jun. 497.

death Elizabeth his daughter entered, and levied a fine. She had issue one son, who married, and had issue one daughter, Elizabeth Baker. From her the estate was purchased under a decree, and by mesne purchases became vested in the plaintiff.

The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been by deed or will disposed of by John Paine, or by any other person, to whom it might have descended; and if the same should have been so disposed of, it could not then be barred only by Elizabeth Baker.

The Lord Chancellor held a recovery not necessary.

It will occur to the learned reader, that, notwithstanding the defendant's suggestion, it was highly improbable the reversion was disposed of by John Paine, in his life time, such an interest not being marketable; and as he devised all his estate by his will, there was no ground to presume he had made another will. Upon his death, therefore, the reversion descended to his daughter, who by her fine reduced it into possession, and consequently no incumbrance could afterwards be created upon it, as a reversion distinct from the particular estate: so that, in fact, the

the purchaser wished to put the vendor to the expense of a recovery, upon a bare, and indeed very improbable possibility.

Where the probability is great that a purchaser will not be disturbed, he will be forced to accept the title, notwithstanding a defect in it.

Thus in a case (*x*) upon a purchase, it appeared that the estate had been originally granted by the crown, in which grant there was a reservation of tin, lead, and all royal mines. Yet as there had been no search made for royal mines for 111 years, and, upon examination, the probability was great there were no such mines, Lord Hardwicke decreed a specific performance.

So in a recent case (*y*), where a man articled for the purchase of an estate, with some valuable mines, and would not complete, because the mines were under a common, wherein others had a right of common, and consequently he would be subject to actions for sinking shafts to work the mines; Lord Eldon, after shewing the improbability of any obstruction from the commoners, said, that in case such an action were brought, he should think

(*x*) Lyddal v. Weston, 2 Atk. 19.

(*y*) Anon. Chan. 7th Sept. 1803, MS.

a farthing quite damages enough; and therefore decreed a performance *in specie*.

This case must be considered to have turned on the improbability of the purchaser being disturbed; otherwise it seems to have gone to the utmost verge of the law; for although such trifling damages could only be recovered, yet that would be no ground for a non-suit, as was decided in the late case of Pindar v. Wadsworth (z). The estate, therefore, would subject the purchaser to litigation, whenever malice or caprice might induce any of the commoners to commence actions against him.

It is clear that a woman is barred of her dower both at law and in equity, by a legal term created previously to her right of dower attaching on the estate, of which an assignment has been obtained by a purchaser to attend the inheritance (*a*). For although she can recover her dower at law, it will be with a *cesset executio* during the term, and equity will not remove the bar. But notwithstanding that a purchaser can obtain an assignment of an outstanding term, which will bar the vendor's wife of her dower, a fine is always required at the expense of the vendor, for the purpose of securing

(z) 2 East, 154.

(*a*) *Vide infra*, ch. 9.

the

the purchaser from an action at law, whereby he would be put to great expense.

Upon the authority, however, of the case before Lord Eldon, it might perhaps be doubted, whether a court of equity would not enforce a purchaser to accept the title without a fine. It must at the same time be observed, that in the case before his lordship, the vendor could not better the title, when in the case put, a vendor can remove every difficulty at a trifling expense; which circumstance would certainly have great weight with a court of equity. Besides, it cannot be supposed that equity would compel a purchaser to be at the expense of keeping a term on foot, in order to protect himself against the dower of the vendor's wife.

The wife of a trustee in fee, or of a mortgagee in fee, of a forfeited mortgage, is at law entitled to dower; but a fine is on that account never required by a purchaser; because, if the wife of a trustee or mortgagee were to be so ill advised as to prosecute her legal claim, equity would undoubtedly saddle her with all the costs.

But where the wife of a vendor has only an *equitable* jointure, some gentlemen require a fine: this practice is, however, discountenanced by the greater part of the profession, and equity, it is conceived, would

would not sanction it. For if a woman equitably barred of her dower, should bring a writ of dower, it seems clear that equity would protect the purchaser, and condemn the widow in costs.

But it is objected, that if the fund upon which the equitable jointure is charged, should be evicted from the jointress, she could then claim her dower out of any real estate of which she would otherwise have been dowable. And this objection appears to me equally to apply to a legal jointure. For it is by the statute of uses (*b*), by which jointures are made bars to dower, declared, that if any woman be lawfully evicted from her jointure, or any part thereof, without any fraud or covin, then she shall be endowed of as much of the residue of her husband's tenements or hereditaments whereof she was before dowable, as the same lands and tenements so evicted shall amount to. Now no reason appears, why a jointress evicted of her jointure, should not recover her dower out of lands sold by her husband, of which she would have been dowable at common law; and if so, although the wife of a vendor has a *legal* jointure, a purchaser ought to insist on a fine, unless

(*b*) 27 Hen. VIII. c. 10. s. 717, pl. 1002; and see 4 Co. 7. See Gervoyes's case, Mo. 3 b. 4 Bro. C. C. 506, n.

he

he is satisfied that the title to the jointure lands is good.

This, however, is never attended to in practice, and I never heard that the objection was taken; which makes me apprehensive that I have fallen into an error. The point could not, one should think, so long have escaped notice.

But whether a jointress, evicted from a legal jointure, can claim her dower out of lands sold by her husband, of which she was dowable at common law, or whether she is entitled to no relief against a purchaser, it seems clear, that, unless in the case of a legal jointure, a purchaser can call for the title to the jointure lands, or require a fine, he cannot do so in the case of an equitable jointure, where the wife was adult at the time of the marriage; as there can be no doubt but equity would act in strict analogy to legal jointures.

Supposing an equitable jointure to be merely charged on stock vested in trustees, and the wife to have been married under age, there seems reason to contend, that if the fund should be wasted by the trustees, equity would not restrain the wife from proceeding for her dower; and in that case a purchaser would certainly be entitled to a fine. But if the wife was adult at the time of the

the marriage, it should seem that she must sustain the loss occasioned by the dishonesty of her trustees, as she chose to take the provision in bar of dower.

In Caruthers v. Caruthers (*c*), the Master of the Rolls, addressing himself to what was and what was not an equitable bar of dower to an infant, put the case of a charge in bar of dower made upon an estate with a bad title, and held that it would be no bar. A purchaser should therefore be satisfied of the title to the lands, upon which the equitable jointure of a *feme covert* married under age is charged.

It appears from some manuscript opinions, that Mr. Fearne frequently advised a purchaser to take a fine from a vendor and his wife, although she was legally barred of her dower by settlement. To use his own words in an opinion: "It may not be improper to have a fine from Mr. H. and his wife, notwithstanding she is barred of dower by settlement. I frequently advise such a step, to prevent the purchaser at any time from the difficulty of proving, or coming at such settlement; but as the fine is not necessary, it must of course be at

(*c*) 4 Bro. C. C. 500. See 5 Ves. Jun. 192.

the

the purchaser's own expense, if he chuses to have it."

If an estate belonging to different persons is subject to a charge, which upon a division of the estate is apportioned between them; and a part of the estate is afterwards sold, subject to the apportioned charge, without mentioning the circumstance of the original charge, a purchaser will be entitled to some provision by way of indemnity, as the owners of the estate could not, by any agreement amongst themselves, bind the person entitled to the charge, not to come on any part of the estate for the whole (*d*).

But there are not many cases, in which a purchaser would be compelled to take an estate subject to an incumbrance, although an indemnity might be offered him (*e*).

It has been said, that persons purchasing from the assignees of a bankrupt, have no right to expect more than that the assignees should deliver over such title as the bankrupt had.

This was said in a case (*f*) where a man entered into such a contract, and enquiries were directed

(*d*) Abel v. Heathcote, 4 Bro. C. C. 278.

(*e*) See Omerod v. Hardman, 5 Ves. Jun. 722; Paine v. Meller, 6 Ves. Jun. 349.

(*f*) Pope v. Simpson, 5 Ves. Jun. 145.

by

by his counsel, which the assignees thought unnecessary; and they begged he would take the title, or refuse it, as they could give him no better title. The purchaser still required the objections to be cleared up, and the contract to be performed; but the assignees sold the estate to another person, who had notice of the former contract, but was informed the former purchaser was unwilling to complete his purchase (*g*): whereupon the first purchaser filed his bill for a specific performance, but it was dismissed with costs.

On the authority of this case, assignees frequently contend, that they are not bound to clear up any objections to their title; but that the purchaser must take the precise title the bankrupt had, or else wave the benefit of the contract.

The decision does not, however, seem to authorise this conclusion. The same decree would probably have been made, had the vendors been *sui juris*; Lord Rosslyn thinking the objections to the title frivolous. The estate sold for only 84*l.* and the inquiries were so numerous, that it was impossible, his Lordship said, for the defendants selling this small estate, under a bankruptcy, to satisfy them.

(*g*) See Huntingdon v. Howes, Finch, 332.

It may also be observed, that in a prior case (*h*), the court appeared to be of opinion, that assignees were equally bound to clear up objections to their title, as vendors *sui juris*.

Of course equity would not *compel* a purchaser to *accept* a defective title of assignees.

In a case (*i*) where a vendor agreed to sell a leasehold estate, and not having the lease by him, agreed that it should contain *none but fair and usual covenants*, it appeared that the lease contained a covenant not to assign without the consent of the lessor; and Lord Kenyon held it to be a reasonable covenant, and that the vendor could therefore make a good title.

Many gentlemen to whose opinions the greatest deference is due, consider a power to a tenant for life to charge portions for his children, or to appoint the estate amongst his children, as a right to nominate one or more of a certain number of objects to take the portions, or the estate; and that consequently, it is merely a power of selection, and cannot be barred by fine. Numerous titles have been objected to on this ground; and although

(*h*) Spurrier v. Hancock, 4 Ves. Jun. 667; and see Orlebar v. Fletcher, 1 P. Wms. 737.

(*i*) Morgan v. Slaughter, 1 Esp. Ca. 8. See Henderson v. Hay, 3 Bro. C. C. 632; and Folkingham v. Croft, 3 Anstr. 700.

an

an enquiry into the force of the objection may perhaps be deemed irrelevant, it is hoped it will not be altogether unacceptable.

In a very recent case, A. tenant for life (without any limitation to trustees to preserve); remainder to his children as he should appoint; remainder to himself in tail; remainder to himself in fee, levied a fine before making any appointment, and the title was objected to, by a gentleman for whose opinion I cannot but have great respect, on the ground that the power was merely a power of selection, and therefore could not be released, or extinguished by fine.

It must be admitted that the power in this case was merely a power of selection, or, as it is generally termed, a power of specification; but it does not appear to follow from that admission, that the power could not be released, or extinguished. The only ground upon which it can be contended, that the power could not be extinguished or released, is, that it was a power simply collateral; but it will appear, that every case put of a power simply collateral, is where the donee has no interest whatever in the estate (*k*): and such a power

(*k*) 15 H. VII. fol. 1 b.; 355; Willis v. Shorrall, 1 Wall v. Thurborne, 1 Vern. 1 Rep. 111, 174; Mo. 605; Atk. 474.

certainly

certainly cannot be released or extinguished, either by fine, feoffment, or common recovery.

A power appendant, at least as to the life estate, it certainly was not; but it seems to have been a power in gross, which although it did not arise out of the estate of the tenant for life, must be considered as exercisable by him for his own benefit, and not as a mere collateral power. A power to a tenant for life to jointure after his death, is a power in gross (*l*) (10). Now what is a power to jointure but a power of selection

(*l*) Edwards v. Slater, Hard. 410.

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(10) Mr. Powell, (Powers, 13. 27.) does not appear to have clearly understood this case. The case was, that A. tenant for life, with remainders over to strangers; remainder to himself in fee, with a power to create a term of years, to commence after his death, conveyed the lands in fee by bargain and sale, and then executed his power. The decision was, that the power *with respect to the estate for life*, was a power in gross; and therefore during the continuance of the remainders to the strangers, the estate created by it was good; but that the power *in regard to the remainder in fee*, was appendant or appurtenant; and therefore if that remainder should come *in esse*, it would not be affected by the estate created by the power; the remainder having been conveyed by the donee of the power, previously to the execution of the power.

or specification? The tenant for life selects the woman whom he chooses to marry, and then appoints, that after his death, *when his estate has ceased*, she shall take the estate for life.—Here, as in the case before us, the estate appointed cannot take effect out of the interest of the donee of the power, and yet a power of jointuring, like every other power in gross, may be extinguished by fine (*m*). Indeed it is not easy to discover any real distinction between a power of jointuring, and a power of appointing to children. In neither case is the donee compellable to exercise his power, and in each case the power is annexed in privity to his estate for life, and he has an interest arising from the exercise of his power, by the benefits it enables him to bestow. In Edwards v. Slater (*n*) a power to a tenant for life to create a lease for 31 years, to commence after his death, for raising portions, was held by Hale, C. B. and Baron Turner, to be a power in gross, and to be barable by a fine, or feoffment. Lord Hale said, that where the power does not fall within the compass of the estate, as where the tenant for life has a power to make an estate which is not to begin till after his own estate is determined, such power is not appendant, or an-

(*m*) King v. Melling, 1 Ventr. 228.

(*n*) Hard. 410.

nexed

nexed to the land; but it is a power in gross, because the estate for life has no concern in it: and yet such a power (he added) may by apt words be destroyed by release, or by fine or feoffment, which carry away and include all things relating to the land.

This case seems to govern the point before us. Lord Hale's definition of a power in gross, clearly embraces a power to a tenant for life to appoint the estate amongst his children, after his death; and the cases are not easily distinguishable.

The doctrine, however, that powers of this nature cannot be released or extinguished, is by no means new. It has been frequently urged, but without success; and in the very case of Edwards v. Slater, Baron Rainsford held the power to create the term to be a power simply collateral; but this Lord Hale and Baron Turner clearly overruled: which makes the case as strong an authority as can possibly be wished for.

The error into which the profession seem to have fallen, owes its origin, perhaps, to powers in gross being frequently termed powers collateral, and the word "collateral" being considered as meaning *simply* collateral. Thus in Savile v. Blacket (*o*), a power to a tenant for life, to charge

(*o*) 1 P. Wms. 777.

money on the estate, was called by the Lord Chancellor a collateral power; and it is observed in a modern publication of much merit (*p*), "that the power in that case is erroneously called *collateral*; whereas, according to Lord Hale's definition, it was certainly in gross." The observation, that the power in question was a power in gross, is correct; but it was not *erroneously* called *collateral*, as a power in gross, and a power collateral (not *simply* collateral) is one and the same thing.

There is, however, still an authority behind, which may, perhaps, be adduced against this opinion. The case to which I allude is Tomlinson v. Dighton, reported in many books, which was a devise to A. for life; and then to be at her disposal, provided that she disposed of the same to any of her children after her death. She executed the power by lease and release, and a fine; and a question arose as to the due execution of the power. According to the report in Salkeld (*q*), two questions were made, the second of which was, whether this power could be construed as a power appendant to the estate for life, so as by the destroying of that, it might be destroyed, or extinguished; or a *collateral* one? And Powell, J.

(*p*) Saunders on Uses, 164. (*q*) 239.

said,

said, this was not a power appendant or appurtenant, nor was it in the nature of an emolument to the estate, like a lease for life, with a power to make leases for 21 years; for that affects the estate for life, and is concurrent with it, and has its being and continuance at least for some part out of it; but this power arises after the estate, and has its effect upon another interest, so that the estate for life is perfect without it, and no ways altered nor affected by the execution of it.

Upon an attentive consideration of this case, it will appear, that the question was, whether the power was appendant or *in gross?* the word "collateral" being sometimes introduced, as was before observed, instead of the words "in gross." That this was done in the case before us, is proved by Mr. J. Powell's argument, which is to the same effect as Lord Hale's definition of a power in gross, in the before-mentioned case of Edwards v. Slater: and Powell's opinion is perfectly correct; it being clear that by the mere conveyance of the estate for life, by what is termed a rightful, or innocent conveyance, a power in gross is not destroyed. Mr. Justice Powell's opinion certainly was, that the power was a power in gross; and it seems so to have been considered by Mr. Peere Williams who, in his excellent argument in that

case (*r*), in answer to an objection that the power was destroyed, admitted, that if the fine had been levied before the lease and release, it would have operated as an extinguishment of the power.

For he contended, that as the fine came *after* the release, *it came too late to do any hurt*; and although he afterwards said that the power seemed collateral, yet he did not rely upon that, and cited no other authority than the old case of a power to executors to sell, which is clearly a power simply collateral. Parker, C. J. in delivering the resolution of the court, said, that as to the first objection, that the power was extinguished by the fine, it might be answered, that if the power was well executed, it was executed by the deed, which was antecedent to the fine; and therefore it was impossible for the power to be extinguished by the fine (*s*).

From this it clearly appears, that the court thought the power could have been destroyed by fine, as otherwise the answer would have been, not that the fine came too late, but that the power could not have been extinguished by fine. Indeed this is so apparent, that the case of Tomlinson v. Dighton would not have been dwelt upon so long,

(*r*) See 1 P. Wms. 149. (*s*) 10 Mod. 72.

had

had not the late Mr. Powell, in his Treatise of Powers, (p. 9. 33.) considered the power in this case as a power *simply* collateral. He states broadly, that the court were unanimously of opinion that the wife had, under the will, an estate for life *only, with a power of specification simply collateral*; and this error has been copied from Powell into a note to the last edition of the Modern Reports (*t*), as will appear on examination of the authorities referred to in that note.

If the learned reader should agree with me in thinking, that in Tomlinson v. Dighton, the power was deemed a power in gross, that case alone must remove the objection taken by the profession, and is a decisive answer to the objection raised in the case to which I have been addressing myself.

Before quitting this subject, it may be remarked, that Lord Hale's definition of a power in gross may always be successfully resorted to in practice, as a mean to discover whether or no any particular power be a power in gross.

It so often becomes necessary to consider in what cases an uninterrupted possession creates a title, that the introduction of a few general obser-

(*t*) 1 Mod. 190. N. (f).

vations on the operation of the statutes of limitations, may not be deemed impertinent.

1. The statutes of limitations operate by way of bar to the *remedy*, and not, like the statute of fines, as a bar to the *right*. Therefore, although a person is barred of one remedy, yet he may pursue any other remedy which may afterwards accrue to him. Thus where a tenant in tail discontinued for three lives, and the issue in tail was barred of his formedon by the 21 Jac. I. (*u*); afterwards by the deaths of the three tenants for life, a right of entry accrued to the issue, who entered, and his entry was held lawful (*x*).

2. It is a very common error, that the rights of infants, *femes covert*, persons in prison, and beyond sea, are saved by the Act of 32 Hen. VIII. (*y*); but on examination it will appear, that the saving extended only to persons who laboured under any of those disabilities *at the time the statute was made* (z).

3. The saving clause in the Act of James, only extends to the persons on whom the right *first* descends, and therefore when the time once begins

(*u*) Ch. 16.
(*y*) Ch. 2.
(*x*) Hunt v. Bourne, Lutw. 781; 2 Salk. 422; Com. 60. 124; 1 Bro. P. C. 53.
(z) See Bro. Reading, p.

to run, nothing can stop it. So that on the death of a person in whose life the time first began to run, his heir must enter within the residue of the 10 years, although he laboured under a disability at the death of his ancestor.

In the case of a fine, it seems that if a person die under a disability, his heir is excepted out of the statute of fines, by the proviso (*a*); but in the statute of James, the legislature being aware of this point, expressly provided for the *death* of the person to whom the *first* right should descend, and therefore the heir must enter within 10 years after the death of his ancestor to whom the right *first* descended, although he died under a disability (*b*).

4. It is generally conceived, that a possession for 60 years creates a good title against all the world. Thus Judge Jenkins (*c*), lays it down without qualification, "that a peaceable possession for 60 years makes a right; for 21 Jac. I. ch. 16, takes away the assise; 32 H. VIII. takes away the writ of right and the formedon." So Mr. Justice Blackstone says (*d*), "that the possession of lands in fee simple uninterruptedly for 60 years, is at

(*a*) See Cruise on Fines, pl. 97. 258, and the cases there cited.
(*b*) See Jenkins, 4 Cent.
(*c*) 1 Cent. pl. 49.
(*d*) 3 Comm. 196.

present

present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever." This however, Mr. Christian remarks, in a note to the above passage, is far from being universally true; for an uninterrupted possession for 60 years will not create a title, where the claimant or demandant had no right to enter within that time; as where an estate in tail, for life, or for years, continues above 60 years, still the reversioner may enter and recover the estate.

Perhaps this remark is not sufficiently pointed. Blackstone certainly did not mean, that the lawful possession, during 60 years, of a tenant in tail, for life, or for years, would operate as a bar to the reversioner's title, but he alluded to a clear adverse possession for 60 years.

However, even in this light, his position admits of exceptions: for, as the statutes of limitations bar the remedy only, and not the right, it is possible that an estate may be enjoyed adversely for hundreds of years, and may at last be recovered by a remainder man. For instance, suppose an estate to be limited to one in tail, with remainder over to another in fee, and the tenant in tail to be barred of his *remedy* by the statutes of limitations, it is evident, as his *estate* subsists, the remainder man's right of entry cannot take

place

place until the failure of issue of the tenant in tail; which may not happen for an immense number of years.

This doctrine is illustrated by the great case of Taylor v. Horde (*e*), where an estate was settled on several persons successively in tail; remainder to A. in fee; and one of the remainder men in tail, being out of possession, brought an ejectment, which was held to be barred by the statute of limitations. Afterwards all the tenants in tail died without issue, and the then heir at law of A. brought an ejectment within 20 years from the time his remainder fell into possession, and he recovered the estate.

5. After passing the Act of 32 Hen. VIII. and before that of the 21 Jac. I. although a man had been out of possession of land for 60 years, yet if his entry was not tolled, he might enter and bring any action of his own possession (*f*). Some have thought that still to be law (*g*), but it must be remembered, that the law was altered by the statute of James; by which no person can now *enter*, except within 20 years after his title accrues.

(*e*) 1 Burr. 60; 5 Bro. P.C. 247; Cowper, 689.

(*f*) See 4 Co. 11 b.

(*g*) See Wood's Inst. 557; and Christian's n. to 3 Black. Comm. 196.

6. The

6. The rule in equity, that the statute of limitations does not bar a trust estate, holds only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on one side, and strangers on the other; for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take place.

Therefore, where a *cestui que trust*, and his trustee, are both out of possession for the time limited, the party in possession has a good bar against both (*h*).

7. Although the statute cannot, as between the trustee and *cestui que trust*, operate as a bar to the latter, yet the trustee may, in some cases, be barred by the possession of his *cestui que trust*, or those claiming under him (*i*). A *cestui que trust* is as a tenant at will to the trustee, and therefore, unless under very particular circum-

(*h*) Per Lord Hardwicke, *in casu* Lewellin v. Mackworth, Barnard. Rep. Cha. 445; 15 Vin. 125, n. to pl. 1; and see Townsend v. Townsend, 1 Bro. C. C. 550; Clay v. Clay, 3 Bro. C. C., 639, n.; Ambl. 645; and Harmood v. Oglander, 6 Ves. Jun. 199, 8 Ves. Jun. 106.

(*i*) See Lord Portsmouth v. Lord Effingham, 1 Ves. 430; Harmood v. Oglander, 6 Ves. Jun. 199, 8 Ves. Jun. 106.

stances,

stances, time could not operate as a bar (*k*). But where a *cestui que trust* sells or devises the estate, and the vendee or devisee obtains possession of the title-deeds, and enters, and does no act recognising the trustee's title, it seems the statute will operate from the time of such entry. This is a point which daily occurs in practice; but it rarely happens, that a purchaser can be advised to dispense with the conveyance of a legal estate, where the defect will appear on the abstract when he sells.

8. The statutes of limitations certainly cannot operate as between *cestuis que trust*; but it seems that equity, in analogy to the statute, will hold time a bar (*l*). And indeed that equitable rights in general, will, in analogy to the statute, be affected by time, in like manner as legal estates (*m*).

This is exemplified, in some degree, by the rules respecting an equity of redemption, which is a mere creature of the court (*n*).

In Clay v. Clay (*o*), Lord Camden laid down

(*k*) See 3 Mod. 149. Earl Pomfret v. Lord Windsor, 2 Ves. 472.

(*l*) See Harmood v. Oglander, *ubi sup.*

(*m*) See 1 Atk. 476.

(*n*) White v. Ewer, 2 Ventr. 340; Pearson v. Pulley, 1 Cha. Ca. 102; Jenner v. Tracey, and Belch v. Harvey, 3 P. Wms. 288. n.

(*o*) 3 Bro. C. C. 639. n.; Ambl. 645.

this

this doctrine very clearly. He said, "as often as parliament has limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the legislature has fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by parliament. And, therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar."

The legal provisions are so strictly adhered to, that persons labouring under any of the disabilities specified in the statute of limitations, will be allowed the same time as in the case of a legal claim (*p*).

9. These observations may be closed by observing, that few cases occur in which a title depending on the statute of limitations can be recommended. The bare receipt of rent is no ouster, and therefore the operation of the statute must frequently be prevented by the existence of

(*p*) Lytton v. Lytton, 4 Bro. C. C. 441.

a lease

a lease granted by the person whose interest is wished to be barred. So (*q*) there may be a case where the circumstance of concealing a deed shall prevent the statute barring; but then it must be a *voluntary and fraudulent* detaining; for to say that merely having an old deed in one's possession shall deprive a man of the benefit of the Act, is going too far, and would be a harsh construction of a statute made for the quieting of possessions.

Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in equity against the heir at law (*r*); but this practice is now almost wholly discontinued.

In Colston v. Wilson (*s*), the purchaser was in the first instance discharged from his purchase, on account of the will not being proved against the heir at law; but on a rehearing he was compelled to take the title.

(*q*) Per Lord Hardwicke, *in casu* Lewellin v. Mackworth, Barnard. Rep. Cha. 445; 15 Vin. Abr. 126, pl. 8; 2 Eq. Ca. Abr. 579, pl. 9; and see Dormer v. Parkhurst, 3 Atk. 124; see also Snell v. Silcock, 5 Ves. Jun. 469.

(*r*) See Fearne's Posthuma, 234.

(*s*) 3 P. Wms. 190.

This

This decree, however, was made on the particular circumstances of the case, and the point was by no means settled.

But in Bellamy v. Liverside (*t*), the title received the master's approbation, although the will was not proved against the heir at law; and upon exceptions to his report on that account coming on, Lord Kenyon, then Master of the Rolls, overruled them.

It is not unusual to require the heir at law to join in the conveyance, if his concurrence can be easily obtained; and where he is a party to a conveyance in any other character, he is invariably made a conveying party, in his character of heir at law.

In all cases where a bill in equity is filed by a vendor for a specific performance, the defendant, the purchaser, may if he please have a reference as to the title. The rule is founded upon this principle, that if, instead of bringing an action for damages for breach of covenant, the plaintiff seek a specific performance, the defendant has a right, in consideration of the equitable relief which is

(*t*) Chan. 1 June 1786, MS.; and see Wakeman v. Duchess of Rutland, 3 Ves. Jun. 233; *sed vide* Smith v. Hibbard, 2 Dick. 730; and see Travell v. Danvers, Finch. 380.

sought,

sought, to have the title assured in a manner he otherwise could not. Therefore the court never acts upon the fact, that a satisfactory abstract was delivered; unless the party has clearly bound himself to accept the title; but though the abstract is in the hands of the party, who says he cannot object to it, yet he may insist upon a reference t because by the production of papers which can be enforced, and by the examinations and enquiries which can be made, by virtue of the decree, the title may be examined in a manner it never could upon a mere abstract (*u*).

"It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Where this is the case, this should be particularly mentioned to be the agreement of the parties; as it has been argued, that as the defect in question was known, it must be understood to have been the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect" (*x*).

The agreement in such cases, and the covenants

(*u*) See Lord Eldon's judgment in Jenkins v. Hiles, 6 Ves. Jun. 653.

(*x*) See Butler's n. (1) to Co. Litt. 384, a.

to guard against the defect, should be entered into by a separate instrument; unless the objection to the title appear on the face of the conveyance.

Where a vendor has not a title to the estate, the court will not do an impossible thing, but will leave the purchaser to his remedy at law upon the articles (*y*). It is not, however, necessary that a vendor should have the legal estate, for if he has an equitable title, the court will decree a performance (*z*).

It may here be observed, that if an exception taken to a report, that a good title cannot be made, be overruled, the purchaser should obtain an order for the exception to stand over; as if disallowed, it would appear upon record, that a good title could not be made (*a*).

If a good title cannot be made, a purchaser is entitled to his expenses (*b*); and if his money has been lying ready, without interest being made by it, he is also entitled to interest (*c*).

(*y*) Crop v. Norton, 2 Atk. 74; 9 Mod. 233; S. C.; and see 3 Bos. and Pull. 167.

(*z*) Crop v. Norton, *ubi sup.*

(*a*) See 1 Ves. Jun. 567.

(*b*) Richards v. Barton, 1 Esp. Ca. 268. See Camfield v. Gilbert, 4 Esp. Ca. 221.

(*c*) See *infra*, ch. 10; Flureau v. Thornhill, 2 Black. 1078.

But

But if the vendor is (without fraud) incapable of making a good title (*d*), the purchaser is not entitled to any damages for the fancied goodness of his bargain, which he may suppose he has lost. Neither is he entitled to any damages, although he may be a loser by having sold out of the funds, which may have risen in the mean time; because he had a chance of gaining, as well as losing, by a fluctuation of the price (*e*).

If the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems he has a lien for it on the estate, although he may have taken a distinct security for the money advanced (*f*).

(*d*) See 3 Bos. and Pull. *ubi sup.* 167.

(*e*) Flureau v. Thornhill, Atk. 1.

(*f*) Lacon v. Mertins, 3

CHAPTER VIII.

OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.

In sales by private agreement, it is usual to fix a time for completing the contract, which is, at law, deemed of the essence of the contract; but in certain cases, equity will carry the contract into execution, notwithstanding the time appointed be elapsed: for, as Lord Eldon remarks, the title to an estate requires so much clearing and enquiry, that unless substantial objections appear, *not merely as to time*, but an alteration of circumstances affecting the value of the thing; or objections arising out of circumstances, *not merely as to time*, but the conduct of the parties during the time; unless the objection can be so sustained, many of the cases go the length of establishing, that the objections cannot be maintained (*a*).

Objections on account of delay seem divisible into two kinds. The one where the delay is

(*a*) Per Lord Eldon, see 7 Ves. Jun. 274.

attri-

attributable to the neglect of either party; the other where the delay is unavoidably occasioned by defects in the title; and of each of these, we shall treat in its order.

I. First then, with respect to delays occasioned by the neglect of either party.

The time fixed on for the completion of a contract, was formerly paid less attention to in equity, than it now is, which seems to have arisen from the case of Gibson v. Paterson (*b*), where, according to the report, a specific performance was decreed in favor of the plaintiff, the vendor, without any regard had to his negligence in not producing his title-deeds, &c. within the time limited. And Lord Hardwicke is reported to have said, that most of the cases which were brought into the court, relating to the execution of articles for the sale of an estate, were of the same kind, and liable to that objection; but that he thought there was nothing in the objection.

It appears, however, that this case is misreported; for Lord Rosslyn, in Lloyd v. Collet (*c*), said, he had looked into the case of Gibson v. Paterson, in which the reporter had made Lord Hardwicke treat the time as wholly immaterial. He

(*b*) 1 Atk. 12.

(*c*) 4 Ves Jun. 690, N.; and 4 Bro. C. C. 497.

said it was to be observed, that the circumstances of that case, of which he had taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought an estate in mortgage. The contract took place in November, and was to be completed in February; in that time therefore the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee, who consented to take his money. Drafts of conveyance were made, and countermanded by the purchaser. He had, after the contract, demised part of the estate to the vendor at a rent; and upon application being made to him, every thing being ready, he said he would be off the bargain; he had no money to pay for it; and if they attempted to force him, he would go to Scotland to avoid it. Lord Rosslyn added, there could not be the smallest argument upon it, nor the least doubt about the decree.

The true ground of the decision in Gibson v. Paterson being ascertained, it has been settled, that a man cannot call upon a court of equity for a specific performance, unless he has shewn himself ready, desirous, prompt, and eager; and therefore time alone is a sufficient bar to the aid of the court.

Thus

Thus in a case (*d*) where the parties differed as to the construction of an agreement, and after a delay of 7 years, one of the parties filed a bill for a specific performance, it was dismissed merely on account of the staleness of the demand.

If the vendor be not ready with his abstract, and title-deeds, at the day fixed, an action will not lie against the purchaser for non-performance of the agreement.

Thus in a case (*e*) where upon a sale it was agreed that a good title should be made out by the 10th of July. In the beginning of July the purchaser called on the vendor to shew him the title-deeds, but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title-deeds at the particular day.

This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as for the

(*d*) Milward v. Earl of Thanet, 5 Ves. Jun. 720, N.

(*e*) Berry v. Young, 2 Esp. Ca. 640, N.

vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before the time agreed upon for its delivery (*f*); or do not ask for it until it has become impossible to execute the agreement by the day fixed (*g*), equity will consider the time as waved.

So, if the purchaser receive the abstract after the day appointed, and do not at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance *in specie* (*h*).

It is, however, clearly settled, that a specific performance shall not be enforced, where no steps have been taken by the vendor, although in proper time urged by the purchaser to do so, and the purchaser, immediately when the time is elapsed, insists upon his deposit, and refuses to perform the agreement.

This was decided in Lloyd v. Collet (*i*); the case was, that on the 10th August 1792, the defendant contracted for the purchase of the

(*f*) Guest v. Homfray, 5 Ves. Jun. 818.

(*g*) Jones v. Price, 3 Anstr. 924.

(*h*) Smith v. Burnam, 2 Anstr. 527; and see Seton v. Slade, 7 Ves. Jun. 265.

(*i*) 4 Bro. C. C. 469; 4 Ves. Jun. 689; and see Pincke v. Curteis, stated *infra*; Potts v. Webb, 4 Bro. C. C. 330, cited; and Paine v. Meller, 6 Ves. Jun. 349.

estate,

estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it; and afterwards repeatedly applied for it before the 10th of June 1793, when he brought an action for the deposit. On the 16th of September 1793, an abstract was delivered; the purchaser was then out of town, and on his return on the 25th of October, wrote, insisting that he would not complete. On the 6th of November the bill was filed by the vendor for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of the parties, inevitable accident, &c. might induce the court to relieve; but it was a different thing to say, the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it. And his Lordship, therefore, considered the contract as at end.

But where a vendor has proceeded to make out his title, and has not been guilty of gross negligence,

negligence, equity will assist him, although the title was not deduced at the time appointed.

Thus in Fordyce v. Ford (*k*), the purchase was to be completed on the 30th of July 1793. The abstract was not delivered until the 8th, and the treaty continued until the 25th of September, on which day the deeds were delivered, and every difficulty cleared up; when the purchaser refused to proceed, alledging that he wanted the estate for a residence for the last summer, and insisting he was not bound to go on, on account of the delay. The Master of the Rolls said, the rule certainly was, that where in a contract either party had been guilty of gross negligence, the court would not lend its assistance to the completion of the contract; but in this case he thought there had been no such negligence, and decreed accordingly; adding, that he hoped it would not be gathered from thence, that a man was to enter into a contract, and think that he was to have his own time to make out his title.

The rules on this subject apply, as they ought to do, to each party.

And therefore where a purchaser permits a long time to elapse, without evincing any intention to

(*k*) 4 Bro. C. C. 494.

carry

carry his contract into execution, he will be left to his remedy at law, although he may have paid part of the purchase-money (*l*). Nor will he be assisted by equity, where he has made frivolous objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered (*m*).

The time however is more particularly attended to in sales of reversions; for it is of the essence of justice that such contracts should be executed immediately and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money, during the delay (*n*).

II. Secondly, we are to consider the effect of delay, where it is unavoidably occasioned by defects in the title.

It may be laid down as a general proposition,

(*l*) Harrington v. Wheeler, 4 Ves. Jun. 686.

(*m*) Hayes v. Carell, 1 Bro. P. C. 27; 5 Vin. Abr. 538, pl. 18; Spurrier v. Hancock, 4 Ves. Jun. 667; Pope v. Simpson, 5 Ves. Jun. 145; and Coward v. Odingsale, 2 Eq. Ca. Abr. 688; and see Green v. Wood, 2 Vern. 632; Bell v Howard, 9 Mod. 302; and Main v. Melbourn, 4 Ves. Jun. 720.

(*n*) Newman v. Rogers, 4 Bro. C. C. 391; and see Spurrier v. Hancock, 4 Ves. Jun. 667.

that

that a delay accounted for on this ground will not prevent a specific performance being decreed, where the time fixed for completing the contract is not material. Indeed, where time is not material, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, the vendor should file a bill in equity (*o*); for it is sufficient if the party entering into articles to sell has a good title at the time of the decree; the direction of the court being in all these cases, to enquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement.

This principle was followed in the case of Langford v. Pitt (*p*). And in a late case (*q*), the vendor, at the time he filed the bill for a specific performance, had only a term of years in an estate he had articled to sell, and immediately after the bill filed, procured the fee by means of an act of parliament; and as the day on which the contract was to be carried into execution was not material, a specific performance was decreed.

The same rule prevails at law, if no application for the title has been made by the purchaser, pre-

(*o*) See 6 Ves. Jun. 655. 7 Ves. Jun. 263.

(*p*) 2 P. Wms. 629; and see Jenkins v. Hiles, 6 Ves. Jun. 646; and Seton v. Slade,

(*q*) Wynn v. Morgan, 7 Ves. Jun. 202.

viously

viously to an action by the vendor for breach of contract. For in Thomson v. Miles (*r*), a man agreed to sell a term, of which he stated 40 years to be unexpired. It appeared there were only 39, but by an agreement endorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement; and Lord Kenyon ruled, that the vendor having at that time a good title, was sufficient. His Lordship said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament, gets such an estate as will enable him to make a title, that is sufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, he should not be allowed to set up against the plaintiff, though the power of making that title was obtained after the action brought.

But if the vendor produce a defective title, and the purchaser bring an action for recovery of the deposit, the vendor having a title at the time of the trial will not avail him.

(*r*) 1 Esp. Ca. 184.

Thus

Thus in a late case (*s*) the facts were, that upon a sale it was agreed, that the purchase-money should be paid on or before Lady-day 1803, on having a good title. The vendors were assignees of a bankrupt, who claimed under a will. They thought that he had an estate tail under the will, and that therefore they could make a title; but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir at law of the testator, could make a title by levying a fine, and was willing to join; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before the assizes.

The court, after shewing that the bankrupt took only an estate for life under the devise to him, said, as it was stated, that previous to the time fixed for payment of the money and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt was heir at law of the testator, but the title of the assignees appeared to have been delivered in on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part;

(*s*) Seward v. Willock, 5 East, 198; 1 Smith's Rep. 390. S. C.

and

and that thereupon a right of action at law had accrued to the plaintiff. How far the title since communicated might in another course of proceeding in another place, render the present proceeding abortive; and whether the plaintiff might not be ultimately compelled to fulfil his agreement, was not for them in that action to decide.

In an early case (*t*) the Court of Chancery carried this doctrine very far; for at the time of the articles for sale, or even when the decree was pronounced, Lord Stourton, the vendor, could not make a title, the reversion in fee being in the crown; and yet the court indulged him with time more than once for the getting in the title from the crown, which could not be effected without an act of parliament, to be obtained in the following session; however it was at length procured, and Sir Thomas Meers decreed to be the purchaser.

But it may be doubted whether a court of equity would now allow so much time (*u*).

(*t*) Lord Stourton v. Sir Thomas Meers, stated in 2 P. Wms. 631; and see Sheffield v. Lord Mulgrave, 2 Ves. Jun. 526. Note, it appears that Sir Thomas Meers was mortgagee of the estate; see 1 P. Wms. 146; and it is therefore probable that at the time he entered into the contract, he was aware of the defects in the title.

(*u*) See Omerod v. Hardman, 5 Ves. Jun. 722.

At

At any rate a vendor would not be allowed to come at an unreasonable distance of time, and say he could then make a title (*x*); unless the purchaser, with notice of the defects in the title, had proceeded in the treaty.

For if a purchaser enter into, or proceed in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depends on the defects being cured, he will be held to his bargain, although the time appointed for compleating the contract is expired, and further time may be required to make a good title.

Thus in a case (*y*) where it was agreed upon a purchase, that it should be compleated on the 5th April 1792; it appeared that the purchaser had applied for an abstract at the latter end of January, or the beginning of February, which not being sent to him, he, after the expiration of the time for the completion of the purchase, applied for his deposit, saying, that he should not proceed in his purchase. About the 21st of April, an abstract was sent him, and it appeared that a suit in

(*x*) See Wynn v. Morgan, 7 Ves. Jun. 202.

(*y*) Pincke v. Curteis, 4 Bro. C. C. 329; and see Smith v. Burnam, 2 Anstr. 527; and Paine v. Meller, 6 Ves. Jun. 349.

Chancery

Chancery must be determined before a title could be made, upon which he again declared he would not proceed in the purchase, and again required his deposit. In Trinity term he brought an action for his deposit, and on the 6th of November the bill was filed. The purchaser, by his answer, stated that the suit was still depending, and that questions of law had arisen, which then stood for argument in the Court of King's Bench.

The Lords Commissioners Ashurst and Wilson granted an injunction, which was continued by Lord Rosslyn, who said, in these contracts (sales by auction) in general, the time of compleating the contract is specified, and a deposit is paid; and if the title is not made out by the time, the vendee is entitled to take back his deposit. But in this case *the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication of the delay of the suit, and the present bill was filed, after great delay* (z). If the

(z) His Lordship's judgment shews the true ground of the decree; but according to the state of facts in the report, the case was similar to that of Lloyd v. Collet, stated *supra*, p. 184.

vendee had called for his deposit at the end of the time limited for compleating the purchase, and insisted he would not go on with his purchase, the court would not have compelled him.

The cause was afterwards heard before the Master of the Rolls, who was of the same opinion, and referred it to the master to enquire as to the title.

So in Seton v. Slade (*a*), it appeared that the purchaser was aware of the objections to the title at the time he purchased, and afterwards accepted the abstract within a few days of the time appointed for compleating the contract. He had, however, previously declared, that if the title was not made out by the time, he would relinquish the contract; and the day after the time appointed, he actually applied for his deposit, stating that the abstract, so far from shewing a right in the vendor to convey, stated merely a contract for purchase by him, without noticing a suit in Chancery. But the purchaser having been aware of the objections to the title, and having afterwards received the abstract, a specific performance was decreed.

Notwithstanding that a treaty may have lain dormant for some time, yet if the contract is not abandoned, a performance will be decreed *in specie*,

(*a*) 7 Ves. Jun. 265.

Thus

Thus in a case (*b*) where, upon objections to a title, the business had proceeded for about two years, when the plaintiff's solicitor wrote, calling for a distinct answer, saying that otherwise he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about 14 months, and the defendant resisted a specific performance, on the ground of delay, by which, he stated, he had suffered material inconvenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

But where, upon objections to the title being made (*c*), the purchaser being informed that no better title could be made, said, he would not proceed in the purchase, and afterwards returned the abstract, at the desire of the vendor, at the same time acquainting him (the vendor) that he (the purchaser) still considered the contract was at an

(*b*) Marquis of Hertford v. Boore, 5 Ves. Jun. 719.

(*c*) Guest v. Homfray, 5 Ves. Jun. 818.

end. In about eight months after this, the abstract was returned, with the objections answered, and the bill was filed upon the defendant refusing to complete the contract. But the bill was dismissed, although it was clear that the purchaser had almost all the time wished to be off the bargain. Lord Alvanley, then Master of the Rolls, said, they should have cautioned the purchaser, and told him they were going on to make out a title. If they had done all that, and shewn a probable ground to him (Lord Alvanley) that they might make a good title, he said, he should perhaps not have thought a year too long.

Where circumstances are such that the purchase-money cannot be paid for a length of time, as if the purchaser die, or become bankrupt before the contract be carried into effect, and his executors, or assignees, are not able to get in the assets, or effects, the vendor is entitled to require the contract to be rescinded (*d*), and he will be allowed his costs (*e*); or he may require a specific performance; and if the defendants are unable or unwilling to perform the contract, that the estates may be resold, and if the purchase-money arising

(*d*) Whittaker v. Whittaker, 4 Bro. C. C. 31.

(*e*) Mackreth v. Marlar, Cox's n. 1 to 2 P. Wms. 67.

by

by the resale, together with the deposit, shall not amount to the purchase-money, that the defendants may pay the deficiency.

A bill for these purposes was filed by a vendor against the assignees of a bankrupt, and a decree was made for resale. The deficiency upon that resale was 5016 *l.*; and the cause coming on for further directions, Lord Rosslyn directed that sum to be proved under the commission; saying, the whole purchase-money was the debt, which proving, by the resale, deficient, the residue was to be proved under the commission (*f*).

It remains to consider, whether equity will permit the parties to make the time the essence of the contract.

In Gregson v. Riddle (*g*), the agreement was for a particular day; with a proviso, that in case the title should not be approved in two months, the agreement was to be void, and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose to have the legal estate conveyed. The defendant resisting, a reference was directed, to see whether a good title could be made; Lord Loughborough expressing an opi-

(*f*) Bowles v. Rogers, 6 Ves. Jun. 95, n. (*g*) 7 Ves. Jun. 268, cited.

nion, that the terms of the agreement were complied with. The report was in favour of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waiver of the agreement: but it never was held to make it void. Mr. Mansfield, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted; and the parties would be just as forward as they were then.

On this *dictum* it must be remarked, that the case did not call for it, as the agreement appears to have been *substantially* performed within the time. And Lord Thurlow's opinion has not been followed in subsequent cases.

For in Lloyd v. Collet (*h*), in which the case of Gregson v. Riddle was cited, Lord Rosslyn said, the conduct of the parties, inevitable accident, &c. might induce the court to relieve; but it was a different thing to say, the appointment of

(*h*) 4 Bro. C. C. 469; 4 Ves. Jun. 689, n. stated *supra*.

a day

a day was to have no effect at all, and that it was not in the power of the parties to contract; that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it.

Lord Alvanley, when Master of the Rolls, addressing himself to the case of a purchase of an estate, said, it was now perfectly understood, that if money has been covenanted to be paid at a given day, if it is not paid at the day, at law no action will lie; but if the party can shew that he took the means of paying it, and has been prevented by accidents not in his power, the court will dispense with the strict performance of it; because, as it was formerly said, it is not of the essence of the contract: *but it may be of the essence of the contract*; and the party shall not avail himself of equitable circumstances, unless he shews that there has been no wilful neglect or misconduct on his part (*i*).

And in the late case of Seton v. Slade (*k*), Lord Eldon said, he inclined much to think, notwithstanding what was said in Gregson v. Riddle, that time may be made the essence of the contract.

The case has been assimilated to a mortgage,

(*i*) See 3 Ves. Jun. 693. (*k*) 7 Ves. Jun. 265.

where, although the parties may have expressly stipulated, that if the money be not paid at a particular time, the mortgagor shall be foreclosed, equity will permit him to redeem, in the same manner as if no such stipulation had been entered into. The analogy will not stand the test of criticism. In a mortgage such a declaration is inserted by the mortgagee for his own advantage; but as the land is merely a security for the debt, equity rightly considers that a mortgagee ought only to require his principal and interest, and not to obtain the estate itself, by taking advantage of the necessities of the mortgagor. Once a mortgage and always a mortgage, has therefore become a maxim; and under this maxim, equity is indeed distributed; the parties being put in possession of their respective rights, without detriment to each other. The same reasoning seems to apply to relief against a penalty. But in an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties themselves have mutually fixed upon the time; the *bona fides* of such a transaction seems to be a bar to the interference of a court of equity; and if the contract be vacated by virtue of the agreement, the parties will still

still be in the possession of their respective rights. We may, therefore, perhaps, venture to assert, that if it clearly appear to be the intention of the parties to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity (*l*).

(*l*) See Appendix, No. 6.

CHAPTER IX.

OF THE ABSTRACT AND CONVEYANCE; THE ASSIGNMENTS OF TERMS, ATTESTED COPIES AND COVENANTS TO WHICH A PURCHASER IS ENTITLED; OF SEARCHING FOR INCUMBRANCES; AND OF RELIEF IN RESPECT OF INCUMBRANCES.

THE vendor must at his own expense furnish the purchaser with an abstract of his muniments, and deduce a clear title to the estate. The abstract ought to mention every incumbrance whatever affecting the estate (*a*); but it is considered complete whenever it appears, that upon certain acts done, the legal and equitable estates will be in the purchaser; which may be long before the title can be completed (*b*).

Unless there be an express stipulation to the contrary, the expense of the conveyance falls on

(*a*) Richards v. Barton, 1 Esp. Ca. 268.

(*b*) See 8 Ves. Jun. 436.

the

the purchaser (*c*); who, as we have already seen, must in that case prepare and tender the conveyance (*d*).

The expense attending the execution of the conveyance, is, however, always borne by the vendor. This practice is carried so far, that if the vendor reside in the country, it is usual for the purchaser's solicitor to attend to witness the execution of the deeds, and the costs of the journey, attendance, &c. are invariably paid by the vendor.

If the estate be copyhold, the purchaser must bear the expense both of the surrender to him and of his admission (*e*); and a vendor is not obliged to pay the fine due on the admission of the vendee, although he covenant to surrender and assure the copyholds at his own costs and charges (*f*); because, it is said, the title is perfected by the admittance, and the fine is not due till after (*g*).

But it seems there is a distinction in these cases, and that where the fine is *certain*, it is due before

(*c*) See 2 Ves. Jun. 155; and note, this is the universal practice of the profession.

(*d*) *Supra*, p. 99.

(*e*) Drury v. Man, 1 Atk. 95. Sanders's edition.

(*f*) Graham v. Sime, 1 East, 632.

(*g*) Rex v. Lord of the Manor of Hendon, 2 Term Rep. 484,

admittance.

admittance. The recent authorities (*h*) indeed, have decided that no such distinction exists; and that whether the fine be certain, or uncertain, it is not due till admittance.

The modern cases have proceeded on the authority of the last resolution in Dalton v. Hammond, as reported in Coke (*i*), which appears to authorize the decision; but in Parkins v. Titus (*k*), the Court of King's Bench held, that there were only two sorts of fines the law takes notice of, certain and uncertain. 1. Certain; *in such case the lord is not bound to admit the heir till the tender of the fine*; for which they cited Dalton v. Hammond, as reported in Cro. Eliz. (*l*), Moore (*m*), and Coke (*n*). 2. Uncertain; in such case the lord ought to admit, then to assess the fine, then to demand it, then to bring debt, or enter for non-payment of it; and when it comes to be disputed, the reasonableness of the fine shall be adjudged by the court.

The above rules were clearly laid down in the

(*h*) Graham v. Sime; and Rex v. the Lord of the Manor of Hendon.
(*i*) 4. Co. 28 a.
(*k*) Mich. Term, 3. Jac. B. R. MS.; 3 Mod. 132, S. C.
(*l*) 779.
(*m*) 623.
(*n*) 4 Co. 28 a.

case

case of Dalton v. Hammond, as reported in Croke and Moore; and although the decision, as reported in Coke, seems to have been of fines in general, yet in Willowes's case (*o*), it appears by Sir Edward Coke's own confession, that the decision was merely as to uncertain fines; for it was in that case resolved, "that presently the copyholder was not bound to pay it," (the fine in question) "*because it was uncertain and arbitrable, as it was resolved in Hubbard's case, in the 4th part of my reports, amongst the copyhold cases.*" By this resolution it clearly appears, that the case is truly reported in Croke and Moore; and therefore, if the modern determinations on this point have been made on the authority of that case, as reported in Coke, their authority cannot, it should seem, be deemed conclusive.

I am aware of no other authority which is adduced in support of the decision (*p*). Mr. Watkins indeed, who treats the report in Coke as the correct one, cites 1 Roll. Abr. 507. Copy. (D) pl. 2. which only says, "That if a copyholder refuse to pay his fine for admittance, after it is due, that is a forfeiture." Now without a further in-

(*o*) 13 Rep. 1. and Watk. on Copyholds, 286.
(*p*) See 3 Burr. 1543;

sight

sight into the facts of this case, it can hardly be deemed an authority in favour of the decision, in Dalton v. Hammond, as reported in Coke; because if a fine be uncertain, it will not be due till after admittance, and the assessment and demand thereof made by the lord. Rolle cites Hob. Rep. 185. (135) Denny v. Leman, to shew that the lord must demand the fine; which seems conclusive that Rolle was writing of uncertain fines only; as in the case cited by him, the fine was at the will of the lord.

A purchaser has a right to require the vendor himself to surrender the estate, if copyhold, and to execute the conveyance, if freehold; and he cannot be compelled to accept either a surrender, or conveyance, under a power of attorney, unless an actual necessity appears for it (*q*); as it tends to multiply his proofs, and he may be put under difficulties by these means: for the letter of attorney may be lost, and the party is obliged to prove the execution of it (*r*). A letter of attorney may be revoked the next moment that revocation may be notified to the attorney, without the purchaser know-

(*q*) Mitchel v. Neale, 2 Ves. 679; Richards v. Barton, 1 Esp. Ca. 268; and *see ibid.* 115.

(*r*) See Johnson v. Johnson, 1 Esp. Ca. 89.

ing

ing of it, and then the conveyance would be void; and the purchaser's only remedy would be a suit in equity (*s*).

Besides the vendor may be dead at the time the power is exercised, and then the execution would be void, as the power expires by the death of the principal. For this reason, where a purchaser chooses to permit the conveyance to be executed by attorney, the attorney should execute a declaration of trust, that he will stand possessed of the purchase-money in trust for the purchaser, until it either appear by satisfactory evidence, that the vendor was alive at the time of the execution of the deed, or if he shall be dead, until the estate is duly conveyed to the purchaser.

If a vendor only covenant to surrender or convey lands to a purchaser upon request, he is not compellable to appoint an attorney for that purpose (*t*).

A purchaser may require an assignment of all outstanding terms, of which he could avail himself in ejectment, to attend the inheritance; at

(*s*) Per Lord Hardwicke, in *casu* Mitchel v. Neale, *ubi sup.*; but, as to the power being revoked, see Walsh v. Whitcomb, 2 Esp. Ca. 565.

(*t*) Symms v. Lady Smith, Cro. Car. 299.

least

least it is the practice of the profession to insist on an assignment of such terms; and if the purchaser leave them outstanding, he may not, perhaps, have the full enjoyment of his estate, without, at some future period, being himself at the expense of getting them in: for even a mortgagee would be very unwilling to advance money on the estate, unless the terms were assigned, lest a subsequent mortgagee or purchaser, without notice, should obtain an assignment of them, and so overreach the prior mortgage.

The title to any term of years which a purchaser can require to be assigned to attend the inheritance, must of course be deduced at the expense of the vendor; but the expense of the assignment must be borne by the purchaser, unless the term has never been assigned to attend the inheritance; in which case the vendor must bear the expense both of deducing the title, and of the assignment to attend.

The strict rule seems to be, that the vendor must procure the fee, to be vested, either in himself or a trustee for him; and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal estate having been outstanding for a length of time, or the estate being subject to incumbrances which are to be

be paid off (*u*). It is not, however, usual to insist on this, unless the title cannot be perfected without a private act of parliament; in which case, the expense of obtaining it is always borne by the vendor.

In some cases, perhaps, assignments of terms may be dispensed with.

In Willoughby v. Willoughby (*x*), Lord Hardwicke laid it down, that where an old term had been assigned upon an express trust to attend upon and protect the inheritance, *as settled by such a deed*, or the uses of such a settlement described or referred to particularly, as it sometimes happens, and the conveyancer is satisfied that those uses of the inheritance have never been barred till his new settlement or purchase is made, he may very safely rely upon it, because the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the cases of a purchase or mortgage, where the title-deeds always are, or ought to be, taken in: for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him.

(*u*) See 1 H. Black. 280. (*x*) 1 Term Rep. 763.

Mr. Butler, in his learned and practical notes to Co. Litt. lays down the following rules, respecting the cases in which a purchaser should or should not dispense with an assignment of outstanding terms (*y*).

1st. It may be laid down as a general rule, that wherever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person entitled to receive, to a trustee for the person obliged to pay, the money, is the best possible evidence of the payment of the money, it may be reasonably required as such.

2dly. In case a term for years has been assigned to attend the inheritance, if, upon a purchase, *all* the deeds (as well originals as counterparts) by which the term was created or assigned, are delivered to the purchaser, and he is satisfied, that the trustee in whom it is there said to be vested, has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance; it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it to be to satisfy the requisitions of

(*y*) See the 13th section of n. (1) to 1st Inst. 290 b.

those

those to whom he may afterwards have occasion to mortgage or sell the estate.

3dly. But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee not having previously assigned it, or of the vendor having made no intermediate incumbrance; it seems prudent to require an actual assignment of it to a trustee for him.

Few general rules, besides these, (Mr. Butler adds) can be laid down upon this subject:—and these must from their nature be subject to an endless variety of modifications.

With respect to the second of the above rules, the attention of the purchaser should be particularly called to the requisite, that the vendor has not charged the estate with any intermediate incumbrance. For, as Mr. Powell justly remarks(z), should a case arise, in which the non-possession of the title-deeds, and, amongst others, of the deeds creating the term, and the deed assigning it, can be accounted for in a satisfactory manner, either by such purchaser having had a probable cause assigned him, from whence he may presume that there were no title-deeds belonging to the estate,

(z) 1 Mortg. 407. See Evans v. Bicknell, 6 Ves. Jun. 174.

or of an incumbrancer taking his estate from one who had no right to the title-deeds, and who, therefore, could not give them up, as a mortgagee of a reversion, the title-deeds, in such case, belonging to the tenant for life, it does not appear clear, that the possession of the title-deeds, though comprising among them both the deed creating and the deed assigning the term, would be a good defence against a prior purchaser or incumbrancer, without notice, who should get an actual assignment of such term from the person in whom the legal estate therein should be vested.

It may here be remarked, that where the term does not necessarily appear on the face of the conveyance, it should be assigned to attend by a separate deed, and no notice should be taken of it in the conveyance of the fee. For should the owner bring an ejectment in his own name only, he would be defeated by the production of his conveyance, on the face of which it would appear that the legal estate was in his trustee; it being now settled, that the legal estate must prevail at law (*a*).

The importance of obtaining an assignment of

(*a*) See Doe v. Wroot, 5 East, 132; [and the cases cited in the note to p. 138.

all

all outstanding terms cannot be too strongly impressed on purchasers. If a purchaser has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance, and if he also takes an assignment of the term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance (*b*).

From the case of Stanhope v. Earl Verney (*c*), it seems that a declaration of a trust of a term, in favour of a purchaser, is tantamount to an actual assignment, unless a subsequent purchaser or incumbrancer, *bona fide*, and without notice, procure an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second purchaser or incumbrancer, is *equivalent to an actual as-*

(*b*) Willoughby v. Willoughby, 1 Term Rep. 768, per Lord Hardwicke; and see Forrester, 69.

(*c*) Butler's n. (1) s. 13. to Co. Litt. 290, b.

 signment;

signment; and therefore gives him an advantage over the first purchaser, which equity will not take from him.

But, as we have seen, a case may arise in which an actual assignment would prevail over a declaration of trust of a term, accompanied by the custody of the deeds relating to it.

A purchaser may protect himself, by a term, against the dower of the vendor's wife (*d*), although he had actual notice of the marriage, and of her claim of dower:—a protection, as we shall hereafter see (*e*), to which he is not entitled in any other instance, or against any other person.

The term, however, must be actually assigned to a trustee for the purchaser, if it is intended to be used as a bar to the wife's dower (*f*); because, by the rules of equity, every term attendant on the inheritance, follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it; and therefore, upon the marriage of a man seised of lands of inheritance, in which there is a term outstanding, a right of dower attaches on the inheritance, by the act of law, and in equity the term is equally bound with the inheritance; and

(*d*) *Vide supra*, p. 152.
(*e*) *Infra*, ch. 15.
(*f*) See Maundrell v. Maundrell, 7 Ves. Jun. 567.

as the claim of a purchaser is not more favoured in equity than that of a dowress, a purchaser will not be entitled to the benefit of an outstanding term, to the prejudice and in exclusion of a dowress (11).

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(11) It was the author's intention to submit a note to the learned reader's consideration, on Sir Wm. Grant's decision in Maundrell v. Maundrell, that a general power of appointment given to a person, with remainder to him in fee, is absorbed in the fee; but this has become unnecessary, Lord Eldon having given a decided opinion against the decision of the Master of the Rolls on this point. The principal authorities relied on in the note alluded to, were Sir Edward Clere's case, 6 Rep. 170; Mo. 567; Cox v. Chamberlain, 4 Ves. Jun. 631; Lord Hardwicke's opinion in Peacock v. Monk, 2 Ves. 190; and the distinction settled between the cases of Tickner v. Tickner, 3 Atk. 742, cited; Kenyon v. Sutton, 2 Ves. Jun. 601, cited; and Notts v. Shirley, *ibid.* 604, n. (see 2 Ves. Jun. 157, 429, 662; 6 Ves. Jun. 219; 8 Ves. Jun. 115, 221.) and the case of Luther v. Kidby, 3 P. W. 170, n. It may be observed, that the reason generally given in favour of the existence of the power, and on which the Master of the Rolls would not give an opinion, prevailed as much in the case of Maundrell v. Maundrell, as in any case whatever; for even admitting the power in that case implied that the deed or will ought to be legally executed, yet, if the power subsisted, the estate might have been conveyed by a bare deed of appointment, without the necessity of an entry, a bargain and sale for a year, or livery of seisin.

On the first hearing of the case of Maundrell v. Maundrell, Sir William Grant thought, that in regard to a claim of dower, there was no solid distinction between letting the term remain in the name of the original trustee, and taking an assignment of it to a trustee for the purchaser; but he afterwards ruled the contrary, on the authority of Lord Hardwicke's judgment in Swannock v. Lifford (*g*). The case of Maundrell v. Maundrell, has since come before the Lord Chancellor, on appeal from the Rolls; and I am informed his Lordship said, that, in principle, he thought the purchaser ought to be entitled to the benefit of the term against the dowress, although not actually assigned to a trustee for him; but that, to be sure, if Lord Hardwicke had ruled otherwise, it must be so. The case has not, however, yet received his Lordship's decision. But as Lord Hardwicke certainly does appear to have considered that the purchaser could not avail himself of a term against a dowress, unless it was actually assigned to a trustee for him, it should seem, that Sir William Grant's decree on this point will be affirmed. Indeed the decision (*h*) that a

(*g*) Butler's n. to Co. Litt. 208.

(*h*) Radnor v. Vandebendy, Show. P. C. 69.

purchaser

purchaser could defend himself against a claim of dower by a term assigned to a trustee for him, proceeded not on principle, but on the universal practice and opinion of conveyancers in that respect; so (*i*) that the Court of Chancery and House of Lords were of opinion, that if they were not to permit that to be so, it would be to overturn the general rule, which had been established and practised by many titles to estates, and tend to make such titles precarious for the future. The same reason does not apply where the purchaser neglects to take an assignment of the term; it being the general understanding and opinion of conveyancers, that to protect against dower, the term must be actually assigned to a trustee for the purchaser.

With respect to terms of years (*k*), it may here be further observed, that whenever a term would merge in the inheritance, if united, it shall attend, if in a different person.

(*i*) Per Lord Hardwicke, see Butler's n. *ubi sup.*

(*k*) For the learning respecting terms of years, see Lord Hardwicke's elaborate and admirable judgment in Willoughby v. Willoughby, 1 Term Rep. 763; see also 1 Powell on Mortgages, 385 to 408; the 13th section of Mr. Butler's note to Co. Litt. 290 b.; 2 Trea. Eq. 107 to 120; and Mr. Fonblanque's notes *ibid.*; and 1 Cruise's Digest, 505.

Therefore,

Therefore, where a person purchases the inheritance in his own name, and takes an assignment of a term in the name of a trustee (*l*); or takes a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name (*m*), in both these cases the term attends the inheritance, unless there be an express declaration to the contrary; whether the term be purchased or obtained before or after the purchase of the fee. And in general there is no difference between an assignment of a term to a trustee, in trust to attend the inheritance, and an assignment to a trustee, in trust for the purchaser, his executors, administrators, and assigns (*n*).

So the same rule prevails where a man possessed of a term for years contracts for the inheritance, but dies before the conveyance is executed; as the vendor stands seised in trust for the purchaser from the time of the contract (*o*).

(*l*) Tiffin v. Tiffin, 1 Vern. 1; Whitchurch v. Whitchurch, 2 P. Wms. 236; 9 Mod. 124; Goodright v. Shales, 2 Wils. 329.

(*m*) North v. Langton, 2 Cha. Ca. 156. Dowse v. Derival, 1 Vern. 104.

(*n*) Best v. Stamford, Prec. Cha. 252; Tiffin v. Tiffin, 1 Vern. 1; Pitt v. Cholmondley, Chancery, 9 Nov. 1751, MS.

(*o*) Capel v. Girdler, Rolls, 16th March 1804, MS.

And

And where by reason of an intermediate term outstanding, a term cannot merge, although vested in the purchaser, together with the fee, yet if the purchaser be entitled to such outstanding term, even the term vested in the purchaser, and which cannot merge, shall attend the inheritance, without any express declaration for that purpose (*p*).

If, however, a purchaser cannot obtain an assignment of the whole term, but a reversion is left outstanding, so much of the term as is assigned to a trustee, for the purchaser, will be considered as a term in gross, and not as attendant on the inheritance, unless there is an express declaration for that purpose (*q*):—And the mere intent of the purchaser to obtain the whole interest in the term will not vary the case.

A term for years attendant on the inheritance is not personal assets for payment of debts (*r*); but it is generally stated that such a term is *real*

(*p*) Whitchurch v. Whitchurch, 2 P. Wms. 236. 9 Mod. 124.

(*q*) Scott v. Fenhoullet, 1 Bro. C. C. 69. There are some seeming inconsistencies in Lord Thurlow's judgment; but in Capel v. Girdler, Sir William Grant was of opinion, that it turned on the reversion which the purchaser could not get in, and that it did not infringe on the general rule.

(*r*) Thruxton v. Attorney General, 1 Vern. 340. Tiffin v. Tiffin, 1 Vern. 1.

assets:

assets:—This is, however, a very incorrect expression, for the term itself is not real assets, but is merely attendant on the inheritance, which is.

But where the inheritance is in trustees, and the owner has a term in his own name, and dies indebted, the term, although limited to attend the inheritance, will be liable to debts, for it is assets at law (*s*); and therefore a purchaser should never take the term in his own name, if he do not wish his estate to be personal assets.

Before quitting this subject, it may be remarked, in the words of Mr. Powell (*t*), that it behoves trustees of terms to be very cautious how they act, if called upon to sever the term from the inheritance, lest they inadvertently be guilty of a breach of trust; for wherever a term to attend the inheritance devolves upon a man, every time the *cestui que trust* makes any disposition of the lands, either by way of conveyance or incumbrance, the trustee of the term becomes from thenceforward a trustee for the grantee or incumbrancer, to the extent or amount of his grant or incumbrance; and therefore any assignment by

(*s*) Thruxton v. Attorney General, *ubi sup.*

(*t*) 1 Mortg. 405.

him

him of the legal estate, on other trust than to attend the inheritance, made to any one who has not the prior or leading security or conveyance of the equitable estate, during the term, will, if such trustee can be affected with notice, either actual or presumptive, be a breach of trust, for which the trustee will be answerable in a court of equity.

Therefore, before such trustee severs a term so assigned, in order to use it as a term in gross, to secure mortgagees, or the like, he ought to be satisfied, by the production of the title-deeds, or other satisfactory evidence, that his *cestui que trust* has done no act to affect the inheritance; for it is to be observed, that when a trustee severs a term designated to attend the inheritance, without being satisfied in this respect, he voluntarily takes upon himself to do an act which may vary the rights of those *whose rights* it is *his duty* to protect. Should a trustee voluntarily make a severance in such case, after *actual or presumptive* knowledge that his *cestui que trust* was involved in incumbrances, there can be little doubt but that he would, at least, be saddled with costs, which may prove a very serious consideration to him; it is therefore most prudent, in *such case*, to decline acting, unless upon very sure grounds,

if

if it be not with the direction, and under the indemnity of a court of equity (*u*).

As a trustee ought to be satisfied, that the person by whose direction the term is assigned, is the person entitled to require the assignment, it is usual, by way of authority to the trustee, to recite all the instruments, &c. affecting the fee, from the time the term was created to the date of the deed of assignment; and this is very commonly done even where the term has been assigned to attend the inheritance. In the latter case, however, such a recital is both unnecessary and improper; for the trustee can only be affected by the acts of his own *cestuis que trust*; and therefore, where a term has been actually assigned to attend the inheritance, on a future assignment of it, it is only necessary to recite the deed creating the term, that by divers conveyances and assurances the fee became vested in A. (the person requiring the assignment); and that by divers assignments and acts in law, and ultimately by such a deed (the assignment to attend) the term became vested in the trustee, in trust for A.; and then any instruments affecting the fee, since the last assignment of the term, to attend the inheritance, should be recited.

(*u*) See Evans v. Bicknell, 6 Ves. Jun. 174.

If

If a purchaser cannot obtain the title-deeds, he is, as we have already seen, entitled to attested copies of them at the expense of the vendor, unless there be an express stipulation to the contrary (*x*): and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose (*y*).

But a purchaser is not entitled to attested copies of instruments on record.

This was decided in the case of Campbell v. Campbell (*z*), where the master, in taxing costs incurred by the sale of considerable estates, disallowed the charges for attested copies of deeds and documents upon record; and upon exceptions to his report on that account coming on, the Master of the Rolls over-ruled them, and held that a purchaser was not entitled to such copies at the expense of the vendor.

In some cases, however, a purchaser can obtain attested copies even of instruments on record. For a purchaser is entitled to examine the abstract with the original title-deeds, or with attested

(*x*) Dare v. Tucker, 6 Ves. Jun. 460. Berry v. Young, 2 Esp. Ca. 640, n.

(*y*) Berry v. Young, *ubi sup.*

(*z*) Rolls sittings after —— term 1793, MS.

copies

copies of them; and, therefore, if a vendor has not the instrument itself, and cannot obtain it, he is bound to procure an attested copy of it to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the purchaser is of course entitled to it on the completion of the purchase.

In a case before Lord Rosslyn, where there was an agreement that the vendor should produce the original title-deeds, his Lordship construed it, not only as an engagement to produce the title-deeds, but as a negative stipulation, that he should not give attested copies.

This was certainly presuming a great deal. Lord Eldon has since thought that the pressure of the stamp duties led to that determination (*a*); and it is probable that a similar case would now receive a different determination.

Where a purchaser cannot claim the title-deeds, it is of the utmost importance to him to obtain attested copies of them. But attested copies are not of themselves sufficient security to a purchaser, as they are indeed mere waste-paper against strangers, and cannot be used upon an ejectment, unless, perhaps, as between the parties themselves.

(*a*) See 6 Ves. Jun. 460.

Therefore,

Therefore, in order to enable a purchaser to effectually manifest and defend his title and possession, he is also entitled, at the expense of the vendor, to a covenant to produce the deeds themselves, at the expense of the purchaser; which should in most cases be carried into effect by a separate deed. And where a vendor retains the deed by which the estate he is selling was conveyed to him (which is mostly the case when it relates to other estates), it seems advisable for the purchaser to require a memorandum of his purchase to be indorsed on such deed.

It may here be remarked, that although a purchaser of part of an estate has taken a covenant for the production of the deeds, yet if they afterwards come into his possession by accident, no person can recover them from him who has not a better right to them than he has (z).

Supposing a purchaser to be entitled to the custody of the deeds themselves, yet if any of them be lost, and the vendor can deliver over copies which would be admitted as evidence at law, the purchaser will be compelled to take the title (a).

(z) Yea v. Field, 2 Term Rep. 708.

(a) Harvey v. Philips, 2 Atk. 541. See an opinion of Mr. Booth's, 2 Vol. Ca. and Op. 223.

We are now to enquire to what covenants a purchaser is entitled.

Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c. and the residue is given over, a purchaser is not entitled to any covenants for the title; because no line can well be drawn as to the *quantum* which would make a person liable to covenant; and therefore, if this rule were not settled, a person who only took *5l.* might as well be required to covenant, as one who took a large sum (*d*).

The same rule applies where an estate is sold for similar purposes under an order of a court of equity, or where a bankrupt's estate is sold by his assignees.

In all these cases, the purchaser is only entitled to a covenant from the parties conveying, that they have done no act to incumber.

But this may of course be altered by the agreement of the parties (*e*); and therefore in all agreements for purchase of estates from devisees, &c. in trust to sell, the purchaser should stipulate, that such of the persons entitled to the purchase-

(*d*) Wakeman v. Duchess of Rutland, 3 Ves. Jun. 233, 504, affirmed in Dom. Proc.; and see Lloyd v. Griffith, 3 Atk. 264.

(*e*) See 3 Ves. Jun. 236.

money

money as he may require, shall join in the usual covenants for the title. Where, however, the trust is to pay debts, or trifling legacies, which will exhaust the whole of the purchase-money, it is obvious that such a stipulation could not be carried into effect, and it had therefore better be omitted.

It might, perhaps, be doubted whether equity would, in a case of this nature, enforce a specific performance against a purchaser who had no notice, at the time of entering into the contract, that there was not any person to covenant for the title.

To prevent any difficulty on this ground, it seems advisable to state in the particulars of sale or agreement, that the vendors are devisees in trust to sell, and that the money is to be applied in payment of debts and legacies, which would be notice, that the purchaser could not require covenants for the title.

It must, however, be remarked, that the case of Wakeman v. Duchess of Rutland, is by no means an authority, that *cestuis que trust* of money to be produced by the sale of estates devised to trustees to sell, cannot in any instance be required to covenant for the title. Where the money to arise by sale of the estate is absolutely

given to two or more persons, they are, in fact, owners of the estate, and must accordingly covenant for the title.

So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title.

These cases are put by way of example, and as a caution to the student. Perhaps no decision has been so misapplied in practice as that of Lord Rosslyn, in Wakeman v. Duchess of Rutland.

Where a vendor does not claim by purchase in the vulgar and confined acceptation of that word (*f*), that is, by way of bargain and sale for money, or some other valuable consideration, a purchaser is entitled to require covenants from such vendor, extending to his own acts, and those of the person immediately preceding him, whether the estate be sold by the owner himself, or whether it be sold under the order of a court of equity (*g*), or by trustees under a conveyance from the owner, upon trust to sell.

But a vendor who actually purchased the estate

(*f*) See 2 Black. Comm. 241.

(*g*) 3 Ves. Jun. 236.

himself

himself for money, or other valuable consideration, and obtained proper covenants for the title, is not bound to enter into covenants extending beyond his own acts.

These observations appear to be the result of the decisions on this subject; but it remains to show the practice of the profession with respect to covenants for the title; and it is much to be lamented, that the practice so materially differs from the decided cases. For it is the settled and constant practice of the profession to make all the *cestuis que trust*, whose shares of the purchase-money are in anywise considerable, join in covenants for the title, according to their respective interests; and in order to obtain a regular chain of title, the covenants are extended to the acts of the last purchaser; which indeed is done in every case. Thus, for instance, if I sell an estate which was devised to me, and the devisor's father purchased the estate, the covenants for the title are extended to the acts of the father; and a vendor, who claims under a voluntary conveyance, is considered in the same light as a devisee. So upon sale of a bankrupt's estate, the bankrupt himself is made to enter into covenants for the title, in the same manner as he would have done, had he sold the estate while solvent.

It may here be remarked, that a bankrupt is

always made a party to the conveyance, to prevent the difficulty which the purchaser might otherwise be put to, in maintaining and proving the title.

Before quitting this subject, it must be observed, that in Wakeman v. Duchess of Rutland (*h*), Lord Rosslyn seemed to think it dangerous to make the *cestuis que trust* parties; he said, the prudence of the common clause, that the receipts of the trustees shall be a discharge to the purchaser, would be defeated, and the purchaser would take upon himself the knowledge of all the trusts of the will. If this be so, conveyancers are indeed reprehensible; but as the purchaser buys under the will, whether the *cestuis que trust* be or be not parties to the conveyance, he is equally affected with the knowledge of the trusts, and yet, as *cujus est dare ejus est disponere*, it cannot be supposed that a purchaser could be compelled to see to the application of the purchase-money, when the testator himself has declared he shall not. In Ewer v. Corbet (*i*), it was holden that notice to a purchaser of a bequest of a term, did not signify, *as every person buying of an executor necessarily must have such notice.* This resolu-

(*h*) 2 Ves. Jun. 233, 504. (*i*) 2 P. Wms. 149.

tion

tion applies to the point in question, and seems to place it beyond controversy.

It now comes in order to consider in what cases incumbrances should be searched for.

Judgments should always be searched for on the part of a purchaser; and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty.

If, however, the purchase-money be actually paid, equity would relieve the purchaser against any judgments entered up subsequently to the contract, and payment of the money, and previously to the execution of the conveyance (*k*).

It seems advisable to ask the vendor, or his attorney, whether there are any incumbrances which do not appear on the abstract; for if he answer in the negative, the search for judgments may be postponed until immediately before the execution of the conveyance; and if there are any judgments, and the purchase cannot be completed on that account, the purchaser can recover all his expenses from the vendor (*l*). But it does not seem

(*k*) See Nels. Cha. Rep. 184; 10 Mod. 468; and 1 P. Wms. 278.

(*l*) Richards v. Barton, 1 Esp. Ca. 268.

clear, that, the purchaser would be entitled to recover the expense of the conveyance, unless he had enquired after, or searched for incumbrances before it was prepared.

" The protection afforded by terms of years, against what are called mesne incumbrances, makes it safe, in some cases, to dispense *with a search for judgments.* But this is never prudent, where there is any reason to apprehend notice will be proved, or will be attempted to be proved, on the party, or any of his agents in the business. Besides no term, or other outstanding estate, should be relied on, unless proof can be obtained easily, and at a small expense, of the instruments and acts in law which must be proved to establish the creation and deduction of the term. It should also be ascertained, that its situation is such as enables the party entitled to it to avail himself of it in ejectment. This does not always appear sufficiently attended to. Generally speaking, it is true that the possession of the *cestui que trust* is the possession of the trustee. But it is equally true, that the extent and application of this rule are by no means settled. Great care should be taken, in these cases, where the outstanding estate is relied on, as a protection against mesne incumbrances, that the possession of the actual terre-tenants has not

not been such as to deprive the persons, in whom the outstanding estate or interest is vested, of their entry (*m*)."

Judgments do not bind leasehold estates till writs of execution are taken out upon them, and delivered to the sheriff (*n*). And therefore upon purchase of a leasehold estate, judgments need not be searched for; but the sheriff's office should be searched, for any writs of execution which may have been delivered there.

Where only an equity of redemption of a term is purchased, even the sheriff's office need not be searched, as an execution lodged will not affect it (*o*).

If the estate lie in a register county, the register's office should be searched, for the purpose of ascertaining, not only that the estate is free from incumbrances, but also that the title-deeds are duly registered; as the estate may be lost by neglecting to do so. And if it appear that any deed has not been duly registered, the vendor must

(*m*) Butler's n. 1 s. 13, to Co. Litt. 290 b.

(*n*) *Vide post.* ch. 15.

(*o*) This point appears to have been considered as a new one in Lyster v. Dolland, 1, Ves. Jun. 431; although it was considered perfectly clear, as far back as Lord Hardwicke's time. See Burdon v. Kennedy, 3 Atk. 739.

procure

procure it to be registered at his own expense, previously to the completion of the contract.

It is very seldom that wills are registered; but a purchaser of a devisee should not complete his contract till the will is duly registered. For should any person purchase of the heir at law, *bona fide*, and without notice of the will, and register his conveyance before the registry of the will, he would be preferred to the purchaser of the devisee (*p*).

But if the vendor be both heir at law and devisee, the non-registry of the will is immaterial.

If a purchaser be already seised of the legal estate, as if he be mortgagee in fee, and has contracted for the equity of redemption, the register need not be searched, if he be assured that notice cannot be proved either on himself, or on any one concerned for him; because the mere registration of deeds, as we shall hereafter see, is not notice to a purchaser seised of the legal estate previously to the purchase, and he will therefore be entitled to hold against any *puisne* incumbrance of which he had not notice.

Where a register can be inspected, judgments need not be searched for elsewhere; as judgments

(*p*) See Jolland v. Stainbridge, 3 Ves. Jun. 478.

bind

bind estates in a register county only from the time they are memorialized.

It hath already been observed, that judgments do not bind leasehold estates till delivery of a writ of execution to the sheriff. Writs of execution upon judgments intended to affect leasehold estates in a register county, were never registered, until a form of a memorial for that purpose, was suggested by Mr. Butler's opinion (*q*). From this form many gentlemen may conclude, that writs of execution ought to be registered; and that it is therefore necessary to search the register only on the purchase of a leasehold estate, in like manner as on the purchase of a freehold estate. The registry of writs of execution, however, seems *casus omissus* out of the statutes for registry; and therefore upon the purchase of a leasehold estate situate within a register county, not only the register, but also the sheriff's office, should be searched.

The register ought to be searched immediately before the execution of the conveyance, for the same reason that the search for judgments should be delayed till the last moment.

Mr. Hilliard remarks (*r*) that by the statutes

(*q*) See Rigge on Registry; and *infra*, ch. 15.

(*r*) N. (2) to Shep. Touch. 116.

for registry there is no time limited for registering deeds; and that it is therefore obvious from an inspection of the acts, how necessary it is, *that deeds should be registered immediately on their being executed:* to enforce this the more strongly, he adds, it may not be useless to consider, if a subsequent conveyance or mortgage should be executed for a valuable consideration, and from an almost momentary inattention or delay of the first vendee, or mortgagee, in not immediately registering, the second vendee or mortgagee should register first; whether, in such case, the first vendee, or mortgagee, doth not thereby become in a worse situation than he would have been by law, in case the registering acts had not been made.

It is very clear, that in the case put, the subsequent purchaser or mortgagee, if he had no notice, would prevail over the first vendee, or mortgagee. And it must be remarked, that by delaying to register his conveyance, a purchaser gives a prior incumbrancer, who may have neglected to register his incumbrance, an opportunity of retrieving his error, and thereby establishing his demand on the estate.

It appears, therefore, that there are two cogent reasons why a memorial of the conveyance should be duly registered *immediately* after the execution

of

of the conveyance; the one, that a prior incumbrancer might, during the delay, register his incumbrance; the other, that the delay might give an unprincipled vendor an opportunity of selling the estate to a *bona fide* vendee without notice; who, if he registered his deeds before the registry of the first conveyance, would certainly prevail against the first purchaser.

Having considered in what instances incumbrances should be searched for, let us now inquire, 1st, In what cases a purchaser may detain the purchase-money, if incumbrances are discovered previously to the payment of it: and 2dly, To what relief he is entitled, if evicted after the money is actually paid; and these inquiries will involve the consideration of the cases in which a purchaser will be relieved in respect of defects in the title to the estate.

I. 1. Where an incumbrance is discovered previously to the execution of the conveyance, and payment of the purchase-money, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel payment of the purchase-money (*s*).

(*s*) Vane v. Lord Barnard, Gilb. Eq. Rep. 6; Serjeant Maynard's case, 2 Freem. 1; and see 1 Ves. 88; 2 Ves. 394; 2 Ves. Jun. 441; and 4 Bro. C. C. 394.

2. But

2. But if a purchaser has notice of an incumbrance before executing the articles, and it is by the articles agreed that the vendor shall covenant against incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him (*t*); and he cannot, therefore, detain any part of the purchase-money.

II. 1. Although the purchaser has paid the money, yet if he is evicted before any conveyance is prepared and executed, or before the conveyance is executed by *all* the necessary parties, he may recover the purchase-money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered, and he may have taken possession of the estate (*u*).

2. But if the conveyance is actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money (*x*).

(*t*) Vane v. Lord Barnard, *ubi sup.*

(*u*) Cripps v. Reade, 6 Term Rep. 606; Matthews v. Hollings, Woodfall's Law Land. 35, cited; Johnson v. Johnson, 3 Bos. and Pull. 162; and see Awbry v. Kent, 1 Vern. 472.

(*x*) See Cripps v. Reade; Johnson v. Johnson; and Bree v. Holbech, Doug. 654.

Thus

Thus where (*y*) A. bought an estate, to one moiety of which there was a clear defect of title, which the counsel of the purchaser had overlooked, and he was afterwards evicted of it, upon which he filed a bill asserting his claim to be repaid a moiety of the purchase-money, although the covenants for title did not extend to the eviction, the bill was dismissed (12).

So, if a purchaser neglect to look into the title,

(*y*) See 3 Ves. Jun. 235.

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(12) In the second vol. of Coll. of Decis. p. 518, a case to the same effect is reported.—Lands which were sold with warrandice from fact and deed allenarly, being evicted, but not through default of the disposer, the purchaser brought an action, not upon the warrandice, which was not incurred, but upon this ground of equity, that if he has lost the land, he ought at least to have repetition of the price. It was answered, that when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, that is, to sell what title and interest he has in the subject; the purchaser takes upon himself all other hazards; and therefore if eviction happen otherwise than through the fact and deed of the disponer, he bears the loss. The Lords assoilzied. Craig v. Hopkins.

it

it will be considered as his own folly, and he can have no relief (z).

The purchaser's only remedy in such a case, is to have recourse to the covenants of the earlier vendors, under some of which, perhaps, he may obtain relief (a).

3. It seems, that if the conveyance be actually executed, the purchaser can obtain no relief, although the money be only secured.

In an early case, however (b), where A. had sold to B. with covenants only against A. and all claiming by, from, or under him, B. secured the purchase-money; but before payment, the land was evicted by a title paramount to A's, and Lord Chancellor Finch relieved from the payment of the purchase-money.

The case, it seems, was not taken by the reporter himself, and he adds the following notes, or queries to it.

1st. If declaration, at the time of the purchase treated on, that there was an agreement to extend

(z) Roswell v. Vaughan, 2 Cro. 196; Lysney v. Selby, 2 Lord Raym. 1118; Goodtitle v. Morgan, 1 Term Rep. 755.

(a) See Butler's n. 1 to Co. Litt. 384. a

(b) Anon. 2 Cha. Ca. 19; and see Fonbl. n. (g) to 1 Trea. Eq. 361, 2d edition.

against

against all incumbrances not only special, it could not have been admitted.

2dly. The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because security absolute without condition.

3dly. *Quære*, If this may not be made use of to a general inconvenience, if the vendee, having all the writings and purchase, is weary of the bargain, or on other respects sets up a title to a stranger by collusion?

Nota. In many cases it may be easily done, &c.

These remarks are unanswerable; and if the doctrine in this case were law, the consequences would be of a very serious nature; for what vendor would permit part of the purchase-money to remain on mortgage of the estate, if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted? Indeed this point is so very differently considered in practice, that where part of the purchase-money is permitted to remain on mortgage, although the covenants from the vendor be limited, the vendee invariably enters into general unlimited covenants, in the same manner as he would have done in the case of an independent mortgage.

4thly. Although the purchase-money is paid, and the conveyance is executed by all the parties, yet if the defect do not appear on the face of the title-deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud (*c*), and the purchaser may either bring an action on the case, or file his bill in equity for relief.

But, as Mr. Butler remarks, a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very particular circumstances, charge his real assets. A bill in Chancery, in most cases, will be found a better remedy. It will lead to a better discovery of the concealment, and the circumstances attending it, and may in some cases enable the court to create a trust in favour of the injured purchaser (*d*).

Although the vendor has fraudulently concealed an incumbrance, the purchaser has no lien on the

(*c*) See Harding v. Nelthorpe, Nels. Cha. Rep. 118.

(*d*) See Butler's n. 1. to Co. Litt. 384, a.

purchase-

purchase-money, after it is appropriated by the vendor (*e*).

Where a purchaser pays part of the purchase-money to a creditor of the vendor, by judgment, or other security affecting the land, and also by bond, or other security which does not affect the land, it will be considered as a payment in satisfaction of the judgment, or other incumbrance which charges the estate (*f*).

(*e*) Cator v. Earl of Pembroke, 1 Bro. C. C. 301; 2 Bro. C. C. 282.

(*f*) Brett v. Marsh, 1 Vern. 468.

CHAPTER X.

OF INTEREST.

EQUITY considers that which is agreed to be done, as actually performed; and a purchaser is therefore entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate: and, as from that time the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day (*a*).

This is so plain a rule, that no disputes could ever arise on it, if the purchase-money were not frequently lying dead; in which case it becomes a question, whether the loss of interest shall fall on the vendor or purchaser.

If the delay in completing the contract be attributable to the purchaser, he will be obliged to pay interest on the purchase-money from the time the

(*a*) Davy v. Barber, 2 Atk. 489. See Sir James Lowther v. the Countess Dowager of Andover, 1 Bro. C. C. 396.

contract

contract ought to have been carried into effect, although the purchase-money has been lying ready, and without interest being made of it (*b*).

But if the delay be occasioned by the default of the vendor, and the purchase-money has lain dead, the purchaser will not be obliged to pay interest. The purchaser must, however, give notice to the vendor that the money is lying dead (*c*); as otherwise there is no equality: the one knows the estate is producing interest, the other does not know that the money does not produce interest (*d*).

Wherever therefore a purchaser is delayed as to the title, and means to insist upon this, he ought to apprise the other party that he is making no interest. But even if a purchaser gave such notice, yet if it appears that the money was not actually appropriated for the purchase, or that the purchaser derived the least advantage from it, or in a manner made use of it, the court would compel him to pay interest.

If no time be limited for performance of the agreement, and the purchaser be let into posses-

(*b*) Calcraft v. Roebuck, 1 Ves. Jun. 221.

(*c*) Calcraft v. Roebuck, *ubi sup.*

(*d*) Powell v. Martyr, 8 Ves. Jun. 146.

sion of the estate, he must pay interest on the purchase-money from that time.

It cannot, however, be laid down as a general rule, that a purchaser of estates under a private agreement, shall from the time of taking possession pay interest. At any rate, although the conveyance be executed, yet he shall not pay interest but from the time of taking possession, if prevented from so doing by the vendor (*e*).

If it be agreed, that the purchaser shall take possession of the estate, and pay interest on the purchase-money from that time, and it afterwards appear that a long time must elapse before a title can be made, the purchaser will be entitled to rescind the agreement.

But if the purchaser acquiesce in the delay until the contract is nearly carried into execution, he cannot then appropriate the purchase-money; and by giving notice of that circumstance to the vendor, discharge himself from the payment of interest.

Thus in Dickenson v. Heron (*f*), after the execution of a contract for purchase of an estate, it appeared that an act of parliament was necessary

(*e*) Per Lord Hardwicke, in Blount v. Blount, 3 Atk. 636; and see Powell v. Martyr.

(*f*) Rolls, 16th March 1804. MS.

to

to perfect the title, and that some time must elapse before a title could be made; and it was therefore agreed, that the purchaser should take possession of the estate, and pay interest on the purchase-money. Great delays having arisen, and the purchaser thinking Exchequer-bills, in which the purchase-money was invested, not safe, he sold them, and gave notice to the vendor that the money was lying ready, and without interest being made of it. After the purchase was completed, and the money paid, the vendor filed a bill, asserting his right to interest until the execution of the conveyance.

The cause was heard before the present Master of the Rolls, who pronounced the following judgment:—"An agreement of this nature is totally independent of the interest made by the money. When a purchaser is let into possession, the vendor need not mind what is done with the purchase-money, because the purchaser agrees to pay interest for the money. And such an agreement can only be affected by great delay, because the purchaser is not to be kept for ever bound by a disadvantageous bargain; for the interest might be better than the rents; in which case, if the purchaser was to be bound, notwithstanding an unreasonable delay, the vendor would not mind

how long he delayed making a title. If the objection had been taken at a different time, it would have been better. He should have made the objection when he knew that an act of parliament was necessary, as he was not before in possession of that fact (13). But he waved this delay, and he consents to continue to pay interest, and writes a letter which clearly implies that; or he might otherwise have waved the agreement. Afterwards he thinks he is entitled to say, that he will not pay interest. The ground was totally distinct. He had laid out his money in Exchequer-bills, and then, upon a supposition that they were not safe, he sold out, and then gave notice that he would not pay interest. He ought certainly to have given notice before he sold out; and to have given the vendor his option, whether he would choose them to remain at his risk, or would wave his interest. This ground was, however, nothing to the vendor, as he had nothing to do with the interest. The only ground upon which he could have waved the agreement,

(13) Here the Master of the Rolls seems to have mistaken the case. For the fact, (which I collect from the papers in the cause, and a personal knowledge of the circumstances) was, that the agreement as to the purchaser taking possession and paying interest, was not entered into till it was discovered that an act of parliament was necessary.

was

was the delay in the first instance. The defendant mistook his case; he might have come at an earlier period, and insisted not to pay interest; for a court would not have held him to an indefinite period. Besides, the notice was not given until a long delay could not take place." And his Honor, for these reasons, decreed the purchaser to pay interest; but, as he bound himself by his long acquiescence, his Honor would not give costs.

From the time, however, the conveyance is ingrossed and delivered to the vendor's attorney for execution, a purchaser is not compellable to pay interest, although he may have neglected to apprise the vendor that the purchase-money is lying dead; because if the conveyance were executed, the next moment he must pay the money, and therefore he ought to have it ready.

For this reason, in Dickenson v. Heron, the purchaser was decreed to pay interest until the date of the conveyance only, although it was not executed until three months afterwards.

The purchaser of a reversion must pay interest on the purchase-money from the time the conveyance is executed; because the wearing of the lives is equivalent to taking the profits (*g*).

(*g*) *Ex parte* Manning, 2 Abingdon, 1 Ves. Jun. 94. P. Wms. 410; Child v. Lord

And

it must be remarked, that in Blount v. Blount (*r*), Lord Hardwicke said, that where estates for life have dropped in between a person being reported the best purchaser before a master, and his taking possession, the court have either directed the purchaser to make some compensation in consideration of the estate being bettered, or otherwise to go before a master again, and the estate to be put up for a new bidding.

But the present practice of the courts, is not conformable to Lord Hardwicke's doctrine; the rule being to make the purchaser pay interest from the time the report is confirmed; from which time he is entitled to the profits of the estate, which are, the wearing out of the lives (*s*).

Where a purchaser is entitled to recover a deposit paid by him to the vendor, he can also recover interest on it from the time it was paid.

And if the agreement be executed by a court of equity, interest is always allowed on the deposit (*t*).

I learn also, that even where a purchaser can recover a deposit paid to an auctioneer, he can also recover interest on it. Upon principle, perhaps,

(*r*) 3 Atk. 636.

(*s*) Child v. Lord Abingdon, 1 Ves. Jun. 94; and see *Ex parte* Manning, 2 P. Wms. 410.

(*t*) Lacon v. Mertins, 3 Atk. 1.

this

this rule cannot be supported: for an auctioneer is bound to keep a deposit till the execution of the contract, as a trustee, or depositary of it: for which reason it even seems, that if he actually made interest of it, he ought not to be compelled to pay interest (*u*). Upon convenience, however, this practice may be tolerated; as the purchaser ought to receive interest, and the auctioneer can recover it from the vendor.

But if a purchaser can only recover the money by an action for money had and received, he cannot sustain a demand of interest (*x*).

If a vendor cannot make a good title, and the purchaser's money has been lying ready, without interest being made by it, the vendor must pay interest to the purchaser (*y*).

An agreement, that if the purchase-money be not paid at the time stipulated, the purchaser shall pay a rent for the estate exceeding the legal interest of the money, is not usurious (*z*).

(*u*) See Lord Salisbury v. Wilkinson, 8 Ves. Jun. 48; and 3 Bro. C. C. 44, cited. *Sed vide* Willis v. the Commissioners of Appeals in Prize Causes, 5 East, 22.

(*x*) Walker v Constable, 1 Bos. and Pull. 306.

(*y*) Flureau v. Thornhill, 2 Black. 1078. See Powell v. Martyn, 8 Ves. Jun. 146.

(*z*) Spurrier v. Mayoss, 4 Ves. Jun. 527.

CHAP.

ses (*b*), freehold lands were not bound by even specialty debts in the hands of an *hæres factus*; although an *hæres natus* was liable to specialty debts in respect of lands descended (14). But personal property, which was formerly of very trifling value, was always holden to be subject to the *payment of debts generally*, however the same might be bequeathed. And by the statute Westminster 2 (*c*), it was enacted, that even the ordinary should be bound to pay the debts of the intestate, so far as his goods would extend, in the same manner as executors were bound in case the deceased had left a will. In fact no man can

(*b*) 3 and 4 W. and M. c. 14. (*c*) 13 Ed. I. c. 18.

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(14) Although an heir at law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them. The statute of fraudulent devises was always considered as placing a devisee on exactly the same footing as an heir at law; but it was lately contended (see Matthews v. Jones, 2 Anstr. 506,) that the debts of the testator would bind a purchaser from the devisee, although he bought *bona fide* and without notice. But this was over-ruled. Equity will however, in behalf of creditors, grant an injunction against a purchaser to restrain payment to the heir. Green v. Lowes, 3 Bro. C. C. 217.

exempt

can exempt his personalty from the payment of his debts; but the same must go to his executors as assets for his creditors, and be applied in a due course of administration; that is, *however it may be bequeathed*, it must go to the executors, upon trust, in the first place, for payment of debts generally.

Although the author of the trust may have neglected to free the purchasers of his property from the obligation of seeing that the money is duly applied, yet equity hath thought it reasonable that a purchaser should see to the application of the purchase-money, where the trust is of a defined and limited nature only; and not where the trust is general and unlimited, as a trust for payment of debts generally.

From these rules, therefore, it necessarily follows, that a *bona fide* purchaser of a leasehold estate from an executor, ought not to be bound to see to the application of the purchase-money, although defined and limited trusts be declared of the purchase-money.

But, as a testator can declare an original limited trust of his real estate, wherever such a trust is created, the purchaser is, of course, bound to see the money duly applied.

Having endeavoured to investigate the prin-

ciples of the rules on this subject, let us now examine, rather minutely, the rules themselves. And, first, with respect to real estate,

1. If the trust be of such a nature, that the purchaser may reasonably be expected to see to the application of the purchase-money, as if it be for the payment of legacies, or of debts which are scheduled or specified, he is bound to see that the money is applied accordingly (*d*); and that although the estate be sold under a decree of the Court of Chancery (*e*), or by virtue of an act of parliament (*f*).

2. If more of an estate be sold than is sufficient for the purposes of the trust, that will not turn to the prejudice of the purchaser; for the trustees cannot sell just so much as is sufficient to pay the debts, &c. Besides, in most cases, money is to be raised to pay the trustees' expenses (*g*).

(*d*) Culpepper v. Aston, 2 Cha. Ca. 115, 221; 2 Show. 316. Spalding v. Shalmer, 1 Vern. 301. Dunch v. Kent, 1 Vern. 260. Anon. Mose. 96. Abbot v. Gibbs, 1 Eq. Ca. Abr. 358, pl. 2. Smith v. Guyon, 1 Bro. C. C. 186, and the cases cited in the note. And see 1 Ves. 215; and Appendix to 1 Bro. C. C. 11.

(*e*) Lloyd v. Baldwin, 1 Ves. 173.

(*f*) Cottrell v. Hampton, 2 Vern. 5.

(*g*) Spalding v. Shalmer, 1 Vern. 301.

3. Where

3. Where the trust is for payment of debts generally, a purchaser is not bound to see to the application of the purchase-money, although he has notice of the debts; as a purchaser cannot be expected to see to the due observance of a trust so unlimited and undefined (*h*).

4. Nor is a purchaser bound to see the money applied, where the trust is for payment of debts generally, and also for payment of legacies (15); because to hold that he is liable to see the legacies paid, would in fact involve him in the account of the debts, as they must be first paid (*i*) (16).

(*h*) See the cases cited above; and *Ex parte* Turner, 9 Mod. 418; Hardwicke v. Mynd, 1 Anstr. 109; and Williamson v. Curtis, 3 Bro. C. C. 96.

(*i*) Jebb v. Abbott, and Benyon v. Gollins, Butler's n. (1) to Co. Litt. 290 b. s. 12; and Rogers v. Skillicorne, Ambl. 188.

5. And

(15) The above rule, although so long and clearly settled, appears to have been entirely overlooked in the case of Omerod v. Hardman, before the Dutchy court, reported in 5 Ves. Jun. 722; but this case can by no means be considered as an authority, and has been expressly denied by Lord Eldon. See 6 Ves. Jun. 654, n.

(16) And where the whole money has been raised, the heir or devisee will be entitled to the estates unsold, and the

5. And for the same reason, the purchaser is, of course, not bound to see that only so much of the estate is sold as is necessary for the purposes of the trust.

6. But although there be no specification of the debts, yet a purchaser must see to the application of the money where there has been a decree; as that reduces it to as much certainty as a schedule of the debts. In such cases therefore the purchaser should not pay to the trustees, but must see to the application, and take assignments from the creditors: otherwise he should apply to the court, that the money may be placed in the bank, and not taken out without notice to him; the reason of which is, that it is at his peril (*k*).

7. Where the time of sale is arrived, and the persons entitled to the money are infants, the purchaser is not bound to see to the application of the money; because he would otherwise be implicated in a trust, which in some cases might be of long duration.

(*k*) Lloyd v. Baldwin, 1 Ves. 173.

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creditors, or legatees, will have no remedy against the same; because the estate is debtor for the debts and legacies, but not for the faults of the trustees. Anon. Salk. 153. *Vide* Gugleman v. Duport, H. 12 Geo. II. 1738, Lib. O. 634.

Thus

Thus in the case of Cuthbert v. Baker (*l*), before Lord Thurlow, upon a bill filed for a specific performance, Baker, the purchaser, objected to the title to the estate, which was vested in Cuthbert, in trust to sell, and divide the money among the children of three persons, some of whom were infants, on the ground that he (Baker) would be liable to see to the application of the purchase-money. But this objection was overruled, Lord Thurlow thinking that the receipt of the trustees would be a sufficient discharge, and his Lordship refused to give the purchaser his costs.

8. The same rule must, it is conceived, prevail, where the time of sale is arrived, and the *cestuis que trust* are unborn.

9. Where the trust is to raise so much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems formerly to have been doubted whether the purchaser was not bound to ascertain the deficiency. Mr. Fearne thought a purchaser was bound to do so (*m*). But the opinion and constant practice of the profession is certainly otherwise (*n*). Indeed, a direction that the personal estate shall be first

(*l*) Trinity Term, 1791, p. 121. MS.

(*m*) Fearne's Posthuma, Co. Litt. 290 b.

(*n*) See Butler's n. (1) to

 applied,

applied, only expresses the rule of equity, where, as in a case of this nature, no intention appears to exonerate the personalty from the payment of the debts; and, therefore, such a direction cannot be deemed material.

10. Sometimes a *mere power* is given to trustees to sell, for the purpose of raising as much money as the personal estate shall prove deficient in paying the debts, or debts and legacies. It seems doubtful how this point would be decided, as it might be contended, that unless the personal estate was actually deficient, the power never arose, and consequently could not be duly executed (*o*). Indeed, the case of Culpepper v. Aston (*p*), appears to be an authority, that in a case of this nature, a purchaser is bound to ascertain the deficiency. For in that case the will seems to have given a *mere power* (*q*) to the executors to raise as much money as the personal estate should fall short in paying the debts. The will was revoked *pro tanto* by a subsequent conveyance creating a direct trust to sell and pay debts, under which it seems the purchaser bought; and therefore the point did not call for a decision. But it was resolved, that by the trust (that

(*o*) See Butler's n. (1) to Co. Litt. 290 b.

(*p*) See 2 Cha. Ca. 221.

(*q*) 2 Cha. Ca. 115.

is

is power) in the will to sell, the purchaser did purchase at his own peril, if the personal estate received were sufficient.

The reader must be aware, that unless it be held that the power is well executed, although there was no deficiency, a purchaser must, at his peril, ascertain the fact, notwithstanding that the trust be for payment of debts generally, or being for payment of particular debts or legacies, the *common clause*, that the trustees' receipts shall be sufficient discharges, be inserted in the instrument creating the trust.

Wherever, therefore, a power of this nature is given, and even where a trust for such purposes is raised, it seems advisable, as Mr. Butler remarks, to extend this clause a degree further, by expressly discharging the purchaser, or mortgagee, from the obligation of enquiring, whether the personal estate has been got in and applied; and by expressly authorising the trustees to raise any money they may think proper by sale or mortgage, though the personal estate be not actually got in or applied. For it frequently happens, that the getting in of the personal estate is attended with great delay and difficulty: during which the real estate cannot perhaps be resorted to. This will be obviated effectually by insert-

ing a clause to the above effect. It should, however, be accompanied with a further direction, that so much of the personal estate, and the money raised under the trust, as shall remain after answering the purposes of the trust, shall be laid out in land, to be settled on the devisees of the real estates (*r*).

11. The same rules respecting the liability of a purchaser to see to the application of the purchase-money, appear to apply, whether the estate be devised or conveyed to trustees to sell for payment of debts, &c. or whether it be only *charged* with the debts; although a difference of opinion has prevailed in the profession on this point.

In a case in Mosely (*s*) it was laid down, that a purchaser should be bound to see to the application of the purchase-money, where the debts were only *charged* on the estate.

But in Elliot v. Merryman (*t*), the Master of the Rolls decreed otherwise; because if the contrary rule were holden, no estate could in such cases be sold, except through the medium of the Court of Chancery, which would be productive of the greatest inconvenience.

(*r*) Butler's n. *ubi sup.*

(*s*) Anon. Mose. 96; and see Newell v. Ward, Nels. Cha. Rep. 38.

(*t*) Barnard Rep. Cha. 78; 2 Atk. 41.

Lord

Lord Chancellor Camden (*u*) appears to have been of the same opinion; and in a late case (*x*) Lord Chancellor Eldon said, that where a man, by a deed or will, *charges* or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money.

This point may be considered as settled upon principle, as well as authority. For although a mere charge is no legal estate, but only that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest that will be sufficient for the debts (*y*); yet it is as much a trust, as a direct conveyance or devise to trustees for the same purpose: The only difference is, that in that case, the trust arises by the construction of equity; while in this, it is produced by the express declaration of the party; and when the trust is *in esse*, it seems wholly immaterial by what means it has arisen.

12. Where a purchaser is bound to see to the

(*u*) See Walker v. Smallwood, Ambl. 676.

(*x*) Jenkins v. Hiles, 6 7 Ves. Jun. 323.

(*y*) See Bailey v. Ekins, Ves. Jun. 654. n.

appli-

application of the purchase-money, and the trust is to lay out the money in the funds, &c. upon trusts, if the purchaser see it invested according to the trust, and procure the trustees to execute a declaration of trust, he is in practice considered as discharged from the obligation of seeing to the further application of the money.

This appears to have been the settled practice in Mr. Booth's time; for in answer to a question, how far a purchaser was, in a case of this nature, bound to see to the application of the purchase-money, he said, he was of opinion, that all that would be incumbent on the purchaser to see done in the case, would be to see that the trustees did invest the purchase-money in their own names, in some of the public stocks or funds, or on government securities; and in such case the purchaser would not be answerable for any non-application (after such investment of the money) of any monies which might arise by the dividends or interest, or by any disposition of such funds, stocks, or securities, it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction for the purchase-money was carrying on; and therefore the testator must be supposed to place his sole confidence in the trustees;

trustees; and this, he added, was the settled practice in such cases, and he had often advised so much and no more to be done; and particularly in the case of the trustees under the Duchess of Marlborough's will. And in this opinion Mr. Wilbraham concurred (z).

13. But where a purchaser is bound to see the money applied according to the trust, and the trust is for payment of debts, or legacies, he must see the money actually paid to the creditors, or legatees.

In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one. Or, if the creditors, or legatees, are but few, they may be made parties to the conveyances.

Another mode by which the purchasers may be secured, is, an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges; and then the trustee can be made a party to the several conveyances.

Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into court; and

(z) See 2 vol. Cas. and Opin. 114.

this

this is perhaps the surest mode, as the money will not be paid out of court without the knowledge of the purchaser.

14. Where, however, an estate is charged with a sum of money for an infant, and there is no direction to appropriate the money, a purchaser cannot safely complete his purchase, although the money be invested in the funds, as a security for the payment of the legacy to the infant, when he shall become entitled; for if, in the event, the fund should turn out deficient for payment of the infant's legacy, he must still have recourse to the estate for the deficiency. Nor, it should seem, can equity, in a case of this nature, bind the right of an infant (*a*).

15. It seems hardly necessary to remark, that where lands are charged with the payment of annuities, those lands will be liable in the hands of a purchaser; because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund (*b*).

16. If the names of the trustees be inserted in the usual clause that the receipts of the trustees shall be discharges, every trustee who has ac-

(*a*) Dickenson v. Dickenson, 3 Bro. C. C. 19.

(*b*) Elliot v. Merryman, Barnard Rep. Cha. 78; see Wynn v. Williams, 5 Ves. Jun. 130.

cepted

cepted the trust must join in the receipt for the purchase-money, although he may have released the estate to the other trustees (*c*); because, notwithstanding that he can release the legal estate to his co-trustees, he cannot delegate the personal trust and confidence reposed in him; as the rule is, *delegatus non potest delegare*.

To obviate this difficulty, which must frequently occur, it might, perhaps, be advisable (instead of naming the trustees in the clause) to say, that the receipts "of the trustees or trustee, for the time being, acting in the execution of the trusts hereby created," shall be sufficient discharges. This would probably render it unnecessary for a trustee who had released the estate to join in any receipt; as there could not be the slightest ground to contend, that any personal trust or confidence was given to the trustees named in the instrument creating the trust; and therefore the receipt of the trustees acting in the trusts, for the time being, would satisfy as well the words as the spirit of the clause (*d*).

17. But as no man can impose a trust on another against his consent, no trustee who has refused to accept the trust, and actually renounced,

(*c*) Crewe v. Dickens, 4 Ves. Jun. 97.

(*d*) See Co. Litt. 113, *a*.

need

need join in any receipts; in such cases the receipts of the other trustees will be sufficient discharges (*e*).

18. Where an estate is devised or conveyed to trustees to sell for payment of debts generally, without a clause that their receipts shall be discharges, and they convey to a third person for the purposes of the trust, sales made by him are as effectual as sales made by the trustees themselves, and his receipt is equally a discharge to a purchaser (*f*); because, in such cases, the receipt is effectual by reason of the trust itself, and not owing to any personal confidence given by the author of the trust, or to any express declaration by him for that purpose.

Secondly, We are to consider the rules on this subject, with reference to leaseholds, or chattels real.

1. We have already seen, that however leasehold estates may be bequeathed, they must go to the executors, to be applied, in the first place, in a due course of administration; which is tantamount to a bequest for payment of debts generally: And

(*e*) See Sir William Smith v. Wheeler, 1 Ventr. 128; Hawkins v. Kemp, 3 East, 410.

(*f*) Hardwicke v. Mynd, 1 Anstr. 109; see Lord Braybroke v. Inskip, 8 Ves. Jun. 417.

therefore,

therefore, in analogy to the decisions upon devises of real estates for a similar purpose, it is incontrovertibly settled, that a purchaser of personalty shall in no case be bound to see to the application of the purchase-money, where he purchases *bona fide*, and without notice that there are no debts (*g*).

This principle was adhered to in the case of Humble v. Bill (*h*), before Sir Nathan Wright, where a man bequeathed a specific part of his personalty upon trust to raise a sum of money for his daughter, and the executors mortgaged it, pretending want of assets.

The decision was, however, reversed in the House of Lords (*i*); but the reversal is generally supposed to have proceeded from proof of fraud, and has not been attended to in subsequent cases.

Thus in Ewer v. Corbet (*k*), it was expressly holden, that a term being bequeathed to A. did not prevent the executors selling it, and that notice of the devise was nothing, as every person buying of an executor necessarily must have such

(*g*) Elliot v. Merryman, Barnard Rep. Cha. 78; 2 Atk. 41.

(*h*) 2 Vern. 445; 1 Eq Ca. Abr. 358.

(*i*) See 1 Bro. P. C. 71.

(*k*) 2 P. Wms. 149; and see Burting v. Stonard, 2 P. Wms. 150; and Andrew v. Wrigley, 4 Bro. C. C. 127; and Dickenson v. Lockyer, 4 Ves. Jun. 36.

notice.

notice. And the Master of the Rolls said, he remembered it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of Bill v. Humble; but since that, he took it to have been resolved, and with great reason, that an executor, where there were debts, might sell a term; and the devisee of the term had no other remedy but against the executor to recover the value thereof, if there were sufficient assets for the payment of debts.

2. This doctrine has been carried so far, that a sale in satisfaction of a private debt of the executor, has been holden good (*l*).

But in the first authority on this head (*m*), it appears that the testator had been dead two years before the assignment, although that circumstance is not mentioned in the report (*n*); and it might therefore be supposed, that the executor might in that case have entitled himself to the term, on account of advances made by him in his trust. Yet even on that ground it cannot be supported; for Lord Thurlow decided differently in a similar case,

(*l*) Nugent v. Gifford, 1 Atk. 463; and Mead v. Lord Orrery, 3 Atk. 235; and see Ithell v. Beane, 1 Ves. 215. *Vide Ex parte* Turner, 9 Mod. 418.

(*m*) Nugent v. Gifford.

(*n*) See 4 Bro. C. C. 136.

although

although between three and four years had elapsed from the death of the testator to the assignment (*o*).

With respect to the second authority on this head (*p*), Lord Kenyon expressly dissented from it in the case of Bonny v. Ridgard (*q*); and in a late case (*r*), where an executor, shortly after the decease of his testatrix, transferred stock, part of her estate, to his bankers, to secure a debt due from him, and future advances; the bankers swore that they did not know, or suspect, that the funds were not the property of the executor, either as executor, or devisee; and it appeared in evidence, that he represented himself as absolutely entitled to them, under the will, subject to a trifling annuity, and a few small legacies; yet, although no fraud was proved, as gross negligence appeared in the bankers not inspecting the will, the funds were holden to be liable to the legacies given by the will.

It seems clear therefore, that an executor cannot now dispose of his testator's property, as a

(*o*) Scott v. Tyler, 2 Dick. 724.

(*p*) Mead v. Lord Orrery.

(*q*) 2 Bro. C. C. 438; 4 Bro. C. C. 130, cited; and see Andrew v. Wrigley, 4 Bro. C. C. 125.

(*r*) Hill v. Simpson, 7 Ves. Jun. 152.

security for, or in payment or satisfaction of his own debts.

3. If the executor sell at an undervalue, or to one who has notice that there are no debts, or that all the debts are paid (*s*), or if there be any express or implied fraud or collusion between the executor and purchaser, the sale cannot be supported (*t*).

Fraud and covin will vitiate any transaction, and turn it to a mere colour. If one concerts with an executor, or legatees, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner, contrary to the duty of the office of executor; such concert will involve the seeming purchaser, and make him liable for the full value (*u*).

4. But if the legatee permit a long time to

(*s*) See Ewer v. Corbet, 2 P. Wms. 148.

(*t*) Crane v. Drake, 2 Vern. 616; 7 Vin. 43, pl. 13; 18 Vin. 121, pl. 11; Bonny v. Ridgard, 2 Bro. C. C. 438, cited; Nugent v. Gifford, 1 Atk. 463; and see Gilb. Eq. Rep. 113; Prec. Cha. 434; and Wale v. Booth, 4 Term Rep. 625, n.

(*u*) Per Lord Thurlow. See 2 Dick. 725.

elapse

elapse without asserting his claim, and there are several mesne purchasers, equity will not set aside the sale, although there are suspicious circumstances of fraud (*x*).

5. And although the legatee has only a contingent interest, yet that will be no excuse for delay (*y*); because he has such an interest as will entitle him to know what debts the testator owed, and what part of his estate has been applied to the payment of them.

6. It remains to observe, that Lord Hardwicke thought (*z*) the reversal of the case of Humble v. Bill (*a*), might be proper, because the charge was upon a *particular part* of the estate: his Lordship not however meaning to impugn the general doctrine, which he frequently admitted, and indeed carried further than any other judge.

This distinction Lord Hardwicke appears to have followed, in a case (*b*) where a specific legatee of a mortgage brought a bill to foreclose against

(*x*) Bonny v. Ridgard, *ubi sup.*

(*y*) Andrew v. Wrigley, 4 Bro. C. C. 125.

(*z*) See Mead v. Lord Orrery, 3 Atk. 241.

(*a*) *Supra*, p. 271.

(*b*) Langley v. Earl of Oxford, Ambl. 17; and see Elliot v. Merryman, Barnard. Ch. Rep. 78; and Andrew v. Wrigley, 4 Bro. C. C. 125.

the representative of the mortgagor, who pleaded an account settled between him and the executor of the mortgage, and a release. For his Lordship thought the devisee had a specific lien on the estate, and as the mortgagor had notice of the bequest, he was bound by it.

And the same distinction appears to have been observed in an early case (*c*), where a testator bequeathed a term to his son for 10 years after the decease of his wife, or change of her widowhood; remainder to his three daughters; and made his wife executrix, who assented to the legacy, and entered and enjoyed, and afterwards sold the term under a pretence of want of assets. But the court being satisfied that the testator had sufficient assets to pay his debts, and that the wife had assented to the bequest, the assignment was set aside.

Allowing this distinction to be founded, a purchaser cannot be advised to complete a purchase from an executor of a particular chattel specifically bequeathed, without the concurrence of the legatee; unless he chooses to rely on the *bona fides* of the executor.

(*c*) Thomlinson v. Smith, Finch, 378.

7. Where

7. Where, however, a person is both specific legatee of a chattel, and also executor, a purchase may be safely made from him, if there be no collusion (*d*).

(*d*) Taylor v. Hawkins, 8 Ves. Jun. 209.

CHAPTER XII.

OF THE VENDOR'S LIEN ON THE ESTATE SOLD FOR THE PURCHASE-MONEY, IF NOT PAID.

WHERE a vendor delivers possession of an estate to a purchaser, without receiving the purchase-money, equity, whether the estate be (*a*) (17) or be not (*b*) conveyed, and although there was not any special agreement for that purpose, gives the vendor a lien on the land for the money.

But equity will not raise this equitable lien in

(*a*) Chapman v. Tanner, 1 Vern. 267; Pollexfen v. Moore, 3 Atk. 272; and see 1 Bro. C. C. 302, 424; and 6 Ves. Jun. 483.

(*b*) Smith v. Hibbard, 2 Dick. 730; Charles v. Andrews, 9 Mod. 152.

(17) But note, that in Chapman v. Tanner, and Pollexfen v. Moore, there were special agreements that the vendor should keep the writings. Indeed in the latter case possession had not been delivered. See Mr. Saunders' note to the case, in his edition of Atkins.

favour

favour of a papist incapable of purchasing (*c*); as it would be giving him an interest in land.

If a vendor take a distinct and independent security for the purchase-money, his lien on the estate is gone; as it clearly appears, that he did not trust to the estate, as a security for his money.

Thus upon the sale of an estate, the vendor accepted some stock for the money (*d*); with an agreement, that in case it did not within a limited time produce a sum named, the vendee should make it up that sum. The stock proved deficient; and it was holden, that the vendor had no lien on the estate for the deficiency.

And the same rule must prevail where a vendor accepts a mortgage of another estate for the purchase-money (*e*); or even where he takes a mortgage of the estate sold for only part of the purchase-money; as by taking a mortgage for part, he clearly evinces his election, that the estate should be charged with that part only (*f*).

But it seems that taking the covenant of the purchaser, and of another person, as his surety for

(*c*) Harrison v. Southcote, 2 Ves. 389.

(*d*) Nairn v. Prowse, 6 Ves. Jun. 752.

(*e*) See Nairn v. Prowse.

(*f*) Bond v. Kent, 2 Vern. 281.

payment of the purchase-money, will not deprive the vendor of his lien (*g*).

So it seems, that taking a bond, or note, for the purchase-money, will not affect the vendor's lien.

This was settled by the case of Hearn v. Botelers (*h*), where a bond was taken for the money, and some of it remained unpaid, and the bond was lost; for the opinion of the court was to charge the defendants, in regard of the land in their possession, with the payment thereof; which was of course deciding, that taking a bond, did not deprive the vendor of his equitable lien.

So in Gibbons v. Baddall (*i*), it was said, that if A. sells an estate, and takes a promissory note for part of the purchase-money, and then the purchaser sells to B. who has notice that A. had not received all his purchase-money, the land in equity is chargeable in the hands of B. with the money due on the note. In this case, therefore, the existence of the equitable lien was considered as a point perfectly settled.

But in Fawell v. Heelis (*k*), where a receipt

(*g*) See Elliott v. Edwards, 3 Bos. and Pull. 181.

(*h*) Cary's Rep. Cha. 25; and see Tardiffe v. Scrughan, 1 Bro. C. C. 422, cited; and Harrison v. Southcote, 2 Ves. 389.

(*i*) 2 Eq. Ca. Abr. 682, n. a.

(*k*) Ambl. 724, 1 Bro. C. C. 421, n. 2 Dick. 486.

was

was indorsed on the deed for the purchase-money, (18) although it was not actually paid; and the vendor took a bond for the purchase-money, Lord Bathurst held that he had thereby departed with his lien. He said, he did not find an instance where a bond had been taken for the consideration money (*l*). It was evident the vendor had an opinion of the purchaser at the time, otherwise he would not have let the money remain in his hands. I consider it, his Lordship added, as a transaction distinct, and independent of the purchase: he lends him the money, and he chuses his security, and I think he must abide by it; therefore let the bill be dismissed.

In a subsequent case (*m*), however, Lord Rosslyn was decidedly of opinion against the doctrine laid down by Lord Bathurst. After commenting

(*l*) *Vide* Hearn v. Botelers; Gibbons v. Baddall; and Tardiffe v. Scrughan; which were all prior to the case of Fawell v. Heelis.

(*m*) Blackburn v. Gregson, 1 Bro. C. C. 420; and see Tardiffe v. Scrughan, *ibid.* 423, cited.

(18) This of course could not make any difference in the case, as a receipt for the purchase-money, although signed by the seller, is of no avail if the money be not actually paid. See Coppin v. Coppin, 2 P. Wms. 291.

on

on other cases, he said, the case of Fawell and Heelis remained; there Lord Bathurst doubted whether there was such an equitable lien; it became therefore of great consequence that it should be spoken to. It struck him always, he said, that there was such a lien, and that it was so from the foundation of the court. A bargain and sale must be for money paid. If an estate is sold, and no part of the money paid, the vendee is a trustee: then, if part be paid, was it not the same as to that which was unpaid?

And in the late case of Nairn v. Prowse (*n*), Sir William Grant seemed to incline to the same opinion.

Upon the whole, the better opinion clearly is, that taking a bond, or note, for the purchase-money, or any part of it, will not discharge the vendor's equitable lien on the estate.

In Elliot v. Edwards (*o*), the vendor assigned a leasehold estate to the purchaser, upon payment of part of the purchase-money. The purchaser, and another person as his surety, covenanted for payment of the residue of the purchase-money; and in the assignment was contained a proviso, that the estate should not be assigned until all the

(*n*) 6 Ves. Jun. 752. (*o*) 3 Bos. and Pull. 181.

money

money was duly paid. Lord Alvanley was of opinion, that the vendor had an equitable lien, and that till the money was paid, equity would not compel a specific performance of any agreement by the assignee for sale of the estate.

In Blackburn v. Gregson (*p*), Lord Rosslyn, as we have seen, said, that if an estate is sold, and no part of the money paid, the vendee is a trustee; from which it might, perhaps, be inferred, that a vendor has always an equitable lien where *no part* of the purchase-money is paid: but this cannot be considered as a general rule; it being very clear, that a vendor may depart with his lien, although no part of the purchase-money be paid. Indeed the same rules seem to prevail on this subject, whether the whole, or only part of the purchase-money remains unpaid.

Where a security by bond or note is taken for the purchase-money, and it is intended that the vendor shall not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance; which would effectually prevent a lien being raised by equity on the *presumed* intention of the parties.

It must be remarked, that although equity

(*p*) *Supra.*

raises

raises this lien in favour of a vendor, yet it is not extended to third persons; that is, where the vendor is satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person cannot resort to the equitable lien of the vendor on the estate; or, in other words, cannot require the purchased estate and the personal estate to be marshalled.

Thus in the case of Coppin v. Coppin (*q*), a younger brother purchased an estate of his elder brother, but the purchase-money was not paid. The purchaser made his will, charging his estate with great legacies; but the will was attended by only two witnesses; afterwards the purchaser died, leaving his brother, the vendor, his heir and executor; and it was holden, that he had an equitable lien on the land; that he was entitled to retain the purchase-money out of the assets; and that the legatees could not stand in his place with respect to the equitable lien.

But fraud is an exception to every rule; and therefore in the case of Pollexfen v. Moore (*r*), where the devisee of the estate purchased was also

(*q*) Coppin v. Coppin, Sel. Cha. Ca. 28; 2 P. Wms. 291. In Austen v. Halsey, 6 Ves. Jun. 475, this point was considered as a new one; and see Cox's n. (1) to 2 P. Wms. 295.

(*r*) 3 Atk. 272.

executor,

executor, and had committed a *devastavit* of the personal estate, and afterwards died, whereupon the purchased estate descended to his heir; Lord Hardwicke, in order to relieve a legatee under the purchaser's will, said, he would direct the vendor to take his satisfaction upon the purchased estate, so as to leave the personal estate open to the legatee.

In this case Lord Hardwicke said, that this equity would not extend to a third person, but was confined to the vendor and vendee only; and if the vendor should exhaust the personal assets, the legatee would not be entitled to stand in his place, and to come upon the purchased estate (19).

The first part of the foregoing passage is frequently adduced to prove, that the lien does not exist when the estate passes into the hands of a third person; but by the latter part of the passage, it clearly appears that this was not Lord Hard-

(19) The decree, however, seems hardly reconcilable with his Lordship's judgment (see 3 Atk. 273. n. 3. Mr. Saunders' edition); nor, indeed, do I see the principle upon which it was made, if it be correctly stated, that if the purchaser did not leave assets to pay the purchase-money, *and all his debts, legacies, and funeral expenses*, the deficiency was to be made good out of the purchased estate.

wicke's

wicke's meaning; and in Walker v. Preswick (*s*), Lord Hardwicke said, that this lien prevailed against the purchaser, his heir, or any claiming under him, with notice of this equitable title; which evinces his Lordship's meaning to be, that the purchased estate, and the personal estate of the purchaser, would not be marshalled in favour of a third person, although, as we have seen, Lord Hardwicke allowed it in Pollexfen v. Moore, on the ground of fraud.

It appears then, that this equitable lien prevails against the purchaser and his heir, and all persons claiming under him with notice, although for valuable consideration (*t*).

But it of course would not prevail against a *bona fide* purchaser without notice: and the mere deduction of the title to the estate from the first vendor by recital, will not be sufficient to affect him, for that does not shew it was not paid for (*u*).

Persons coming in under the purchaser by act of law, as assignees of a bankrupt (*x*), are bound

(*s*) 2 Ves. 622.

(*t*) Hearn v. Botelers, Cary's Cha. Rep. 25; Walker v. Preswick, 2 Ves. 622; Gibbons v. Baddall, 2 Eq. Ca. Abr. 682, n. a; Elliot v. Edwards, 3 Bos. and Pull. 181.

(*u*) See 1 Bro. C. C. 302.

(*x*) Blackburn v. Gregson, 1 Bro. C. C. 420; Bowles v. Rogers, 6 Ves. Jun. 95. n. a.

by

by an equitable lien, although they had no notice of its existence: because, as Sir William Grant observes on another point, the assignment from the commissioners, like any other assignment by operation of law, passes the rights of a bankrupt precisely in the same plight and condition as he possessed them. Even where (as in this instance) a complete legal title vests in them, and there is no notice of any equity affecting it, they take, subject to whatever equity the bankrupt was liable to (*y*).

And creditors claiming under a conveyance from the purchaser, are bound in like manner as assignees (*z*); because they stand in the same situation as creditors under a commission.

In Nairn v. Prowse (*a*), the question arose, whether the lien of which we are now treating, should prevail against an equitable mortgage, by deposit of title-deeds? but the case went off on another ground, and the point was not decided.

In Stanhope v. the Earl of Verney (*b*), Lord Northington held, that a declaration of trust of a term in favour of a person, was tantamount to an

(*y*) See 1 Ves. Jun. N. S. 302.

100.

(*z*) Fawell v. Heelis, Ambl. 724; and see 1 Bro. C. C.

(*a*) 6 Ves. Jun. 752.

(*b*) Butler's note 1. to Co. Litt. 290. b.

actual

actual assignment; unless a subsequent incumbrancer, *bona fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him.

It must at one view be seen how strong the analogy is between the point in question, and this case. The only difference between them appears to be, that in the case before Lord Northington, both the trusts were declared by the parties; while in the case put, the trust, or lien, is raised by equity, and not by express declaration, and the trust or equitable mortgage is generally created by the declaration of the parties; which circumstance, if it turn the scale either way, is certainly in favour of the mortgagee: so that, upon the authority of this case, we may perhaps venture to say, that an equitable mortgage, by deposit of deeds to a person, *bona fide*, and without notice, will give him a preferable equity; and will overreach the vendor's equitable lien on the estate for any part of the purchase-money.

CHAP.

CHAPTER XIII.

OF THE PERSONS INCAPABLE OF PURCHASING.

UNDER this head we may consider, 1st, Who are incapable of purchasing: 2dly, Who are capable of purchasing, but incapable of holding: 3dly, Who are capable of purchasing *sub modo:* and 4thly, Who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

First then, With respect to persons who are incapable of purchasing.

The parishioners, or inhabitants of any place, or the churchwardens, are incapable of purchasing lands (*a*).

But churchwardens and overseers are enabled to purchase a workhouse for the poor (*b*): and it seems, that in London, the parson and churchwardens are a corporation to purchase lands (*c*).

(*a*) Co. Litt. 3 a.
(*b*) 9 Geo. I. c. 7. s. 4.
(*c*) Warner's case, Cro. Jac. 532; Hargrave's n. 1. to Co. Litt. 3 b.

Secondly, With respect to persons who are capable of purchasing, but incapable of holding. They are,

1st, Aliens; for although they may purchase, yet it can only be for the benefit of the King; and upon an office found, the King shall have it by his prerogative (*d*).

But if an alien be made a denizen by the King's letters patent, he is then capable of holding lands (*e*).

And it seems, that if an alien purchase lands, and before office found the King make him a denizen by letters patent, and confirm his estate, the confirmation will be good; as the land is not in the King till office found (*f*).

2dly. Persons who have committed felony, or treason, or are guilty of the offence of *premunire*, and afterwards purchase lands, and then are attainted; for they have ability to purchase, although not to hold; and for that reason, the lord of the fee shall have the lands: but if they purchase after they are attainted, they are then in the same situation as aliens, and the lands must go to the King (*g*).

Lastly, Corporations sole, or aggregate, either

(*d*) Co. Litt. 2 b.
(*e*) *Ibid.*
(*f*) Goulds. 29. pl. 4.
(*g*) Co. Litt. 2 b.

ecclesiastical,

ecclesiastical, or temporal, cannot hold lands without due license for that purpose (*h*): and the lord of the fee, or in default thereof within the time limited by the statutes, the King may enter (*i*).

Thirdly, With respect to persons capable of purchasing *sub modo*. They are,

1st. Infants under the age of 21 years, who may purchase, and at their full age may bind themselves by agreeing to the purchase; or may wave the purchase without alleging any cause for so doing: and if they do not agree to the purchase after their full age, their heirs may wave the purchase in the same manner as the infants themselves could have done (*k*).

2dly. *Femes covert*, who are capable of purchasing, but their husbands may disagree thereunto and divest the whole estate; and maintain trover for the purchase-money (*l*). If a husband neither agree nor disagree, the purchase by his wife will be effectual; but after his death, she may wave the purchase, without giving any reason for so doing, although her husband may have agreed to it: And if, after her husband's death, she do not agree to it, her heirs may wave it (*m*).

(*h*) Co. Litt. 99 a.
(*i*) Co. Litt. 2 b.
(*k*) Ketsey's case, Cro. Jac. 320; 1 Ro. Abr. 731; Co. Litt. 2 b.
(*l*) Garbrand v. Allen, 1 Lord Raym. 224.
(*m*) Co. Litt. 3 a.

A *feme covert* may, however, purchase lands pursuant to an authority given by her husband; and he cannot avoid it afterwards (*n*).

3dly. Lunatics, or ideots, who are capable of purchasing; but although they recover their senses, cannot themselves, it should seem, wave the purchase (*o*): and if they recover and agree thereunto, their heirs cannot set it aside.

If they die during their lunacy, or ideocy, then their heirs may avoid the purchase (*p*): as the King has the custody of ideots, upon an office found he may annul the purchase (*q*): and after the lunatic is found so by inquisition, his committee may vacate the purchase (*r*).

Lastly, under this head we may, perhaps, rank Papists and persons professing the Popish religion (*s*), who have neglected to take the oath prescribed by the 31 Geo. III. c. 32 (*t*). For a Papist takes for the benefit of his Protestant next of kin till his conformity; for the benefit of himself after his

(*n*) Garbrand v. Allen, *ubi sup.*

(*o*) On this point see 2 Blackst. Comm. 290.

(*p*) Co. Litt. 3 a.

(*q*) Co. Litt. 247 b.

(*r*) Clerk by Committee v. Clerk, 2 Vern. 412; Addison by Committee v. Dawson, 2 Vern. 678; Ridley v. Ridler, 1 Eq. Ca. Abr. 279.

(*s*) See 11 and 12 W. III. c. 4.

(*t*) See 43 Geo. III. c. 30.

conformity;

conformity; and for the benefit of his heir after his death—Nay, for the benefit of himself, during his life and non-conformity, by reason of the action which is given him; and may therefore be said to be capable of purchasing *sub modo* (*u*).

Fourthly. With respect to persons who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

It may be laid down as a general proposition, that trustees (*x*), agents (*y*), assignees of bankrupts (*z*) (20), solicitors to the commission (*a*),

(*u*) See Mallom v. Bringloe, Willes 75. Com. 570. S. C.

(*x*) Fox v. Mackreth, 2 Bro. C. C. 400; Kellick v. Flexney, 4 Bro. C. C. 161; Whichcote v. Lawrence, 3 Ves. Jun. 470; Hall v. Noyes, 3 Bro. C. C. 483, and see 3 Ves. Jun. 748; Campbell v. Walker, 5 Ves. Jun. 678; and Whitackre v. Whitackre. Sel. Cha. Ca. 13.

(*y*) Mackenzie's case, 6 Ves. Jun. 630, n. b. cited.

(*z*) *Ex parte* Reynolds, 5 Ves. Jun. 707; *Ex parte* Lacey, 6 Ves. Jun. 625.

(*a*) Owen v. Foulkes, 6 Ves. Jun. 630, n. b.; *Ex parte* Churchill, 7 Ves. Jun. 343, cited.

creditors

(20) Lord Eldon has said, that the rule is to be more peculiarly applied with unrelenting jealousy in the case of an

creditors who have been consulted as to the mode of sale (*b*), or any persons, who by their connexion with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves; except under the restrictions after mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity.

This general rule stands much more upon general principle, than upon the particular circumstances of ony individual case. It rests upon this, that the purchase is not permitted in any case, how-

(*b*) See *Ex parte* Hughes, Trecothick, 1 Smith's Rep. 6 Ves. Jun. 617; Coles v. 233.

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assignee of a bankrupt; adding, that it must be understood, that, whenever assignees purchase, they must expect an enquiry into the circumstances. See 6 Ves. Jun. 630, n. b; and 8 Ves. Jun. 346. And an assignee purchasing the estate himself, or permitting his co-assignee to puchaers it, will be a sufficient cause of removal; *Ex parte* Reynolds, 5 Ves. Jun. 707

ever

ever honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases (*c*).

The necessity of such a general rule is evinced by an instance mentioned by Lord Eldon, of a solicitor under a commission, who, finding he could make a bargain to sell the estate for 1400*l.* kept that in his own breast, and made a bargain with the assignees for the purchase of it at 350*l.* (*d*).

In Davison v. Gardner (*e*), Lord Hardwicke laid down the following rules as to a trustee purchasing of his *cestui que trust.* 1st. That in all cases of a trustee purchasing of the *cestui que trust*, the court will look upon it with a jealous eye. 2dly. It has been laid down as a general rule, that where a trustee for persons not *sui juris*, as infants and *femes covert*, becomes both buyer and seller, the court will under no circumstances whatever, be they never so fair between the parties (as consulting the friends of the infant, or their refusing to purchase, or the like), establish a purchase of that kind; unless the transaction is

(*c*) See 8 Ves. Jun. 345, *per* Lord Eldon.

(*d*) See 8 Ves. Jun. 349.

(*e*) Chancery, 21st July, 1743, MS.

 legitimated

legitimated by the act of the court, or some public act. And the reason is, because if such purchases were allowed, they would be liable to very great abuses; and this is the reason why the court will not allow a trustee any thing for his trouble. So, where a trustee renewed a lease in his own name, though it was proved that all the friends of the infant were consulted, and they refused to renew it, the court decreed it to be in trust for the infant, though not the least unfairness appeared; which was the case of Rumford Market, before Lord King. But if a bill is brought, and a sale ordered, and notice of the sale before the master, and the trustee purchases, the court has refused to set such sale aside, all the other circumstances being fair. So where there was a public sale of an estate by proclamation in the country; which was the case of Saunders v. Burroughs, before the present Master of the Rolls; but if that had been a private sale, though the consent of all the relations was had, and no unfairness appeared, I think such a sale should be set aside, at least not carried into execution. But it might be inconvenient to extend the rule so far as to prevent a trustee from purchasing of one who was *sui juris*, where no unfairness appeared. And in the principal case, which was of a mixed kind, the defendant

fendant who had purchased, being a trustee for the plaintiff, who was a *feme covert*, and had the estate to her separate use, and therefore in a court of equity considered as a *feme sole*, and *sui juris* as to the disposal of her estate; Lord Hardwicke dismissed the bill, which was brought to set aside the assignment she had made of her interest in a brewhouse to the defendant; it appearing that she had paid a full value, and no particular instances of fraud being proved.

From this case it appears that in the time of Lord Hardwicke, a purchase by a trustee, even for infants, was deemed good, if the estate was sold by public auction, or before a master; but a purchase by a trustee, whether for adults or infants, cannot now be supported; although the estate be sold by public auction (*f*), or before a master, under a decree for sale (*g*). Nor indeed ought the publicness of the sale to sustain a purchase, which cannot otherwise be supported. For the trustee may know not only the surface value, but that there are minerals, in which case he would buy upon the rent, and gain all

(*f*) Whichcote v. Lawrence, 3 Ves. Jun. 749; Campbell v. Walker, 5 Ves. Jun. 678; and *Ex parte* James, 8 Ves. Jun. 337.

(*g*) Price v. Byrn, 5 Ves. Jun. 681, cited.

that

that advantage. So there may be a great many clandestine dealings, which may bring it to a price far short of that which would be produced, if full information was given (*h*).

But under particular circumstances, a purchase by a trustee, or agent, before the master, may be confirmed, although with great reluctance.

Thus in Wren v. Kirton (*i*), the facts were these. Upon a former sale before the master, the sum of 23,000*l.* was bid by a person bidding *bona fide*. That sale was defeated by setting up a fictitious bidder. Afterwards the lot was again put up three times. On the two first occasions no more was offered than 12,000*l.* and 6,000*l.* At the last sale one Wilson was declared the purchaser at the sum of 15,000*l.* He purchased as trustee for Wade, the agent and manager of the colliery.

The Lord Chancellor said, if this had been an original sale, and the agent had purchased in the name of another person, very slight circumstances would have induced him even at some risk to set that aside; as it was the duty of Wade, if he meant to bid, to furnish all the knowledge he had, to those who were to sell. The difficulty that pressed him was, the consequence, the danger of

(*b*) See 8 Ves. Jun. 349. (*i*) 8 Ves. Jun. 502.

farther

farther loss by resale. He would (he added) not hesitate to open the sale, if the least advance upon 15,000*l.* was offered: but without such an offer there was nothing leading him to suppose it would ever again reach the sum that was originally bid.

The report was, with considerable reluctance, confirmed; unless, on or before the first seal, an application should be made to open the biddings, giving security to answer the difference between the produce of the resale and the sum of 15,000*l.*

No security was however offered, and the agent completed the purchase.

In Oldin v. Samborne (*k*), Lord Hardwicke said, it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but though it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside.

But it seems clear, that such a purchase would now be set aside.

It appears, however, that unless fraud can be proved, the circumstance of the purchaser being related to the trustee, agent, or other person having a confidential character, cannot even be op-

(*k*) 2 Atk. 15.

posed

posed as a bar to the *aid* of the court *in favour of the purchaser.*

Thus in Prestage v. Langford (*l*), the auctioneer's son and another person bought an estate sold by order of a trustee for infant legatees; and contracted to sell it a few days afterwards for 750*l.* more than they gave for it. But the proof of fraud being judged defective, a specific performance was decreed, but without costs; *in order* (as was said) *to discourage all such suspicious transactions.*

So, in the late case of Coles v. Trecothick (*m*), the trustee's father (for whom the trustee in this instance acted as agent), purchased an estate (which had been previously put up to sale by auction, and bought in) of the *cestui que trust*, for 20,000*l.*; and as the *cestui que trust* himself, and not the trustee, fixed the price, and consented to the sale, and no fraud was proved, a performance *in specie* was decreed; although the *cestui que trust* had since the contract been offered 5,000*l.* more for the estate.

It must, however, be observed, that the case of Prestage v. Langford, was decided before the

(*l*) 3 Wood. 448. n. Chan. M. 11 Geo. III.

(*m*) 1 Smith's Rep. 233.

broad

broad rule which now prevails was laid down: And the decision in the case of Coles v. Trecothick does not seem to meet with the approbation of the profession. But if, under the particular circumstances of this case, the court had not compelled execution of the contract, it would certainly have been deciding, that neither a trustee himself, nor any one connected with him, or related to him, can buy of the *cestui que trust*, however fair and open the circumstances may be.

It may here be remarked, that where a power is given by a settlement to trustees to sell the estate with the consent of the tenant for life, or to the tenant for life to sell with the consent of the trustees, it is in practice considered, that the estate may be safely purchased by the tenant for life himself. Lord Eldon, although fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think it cannot be impeached on general principles (*n*). A few years ago considerable doubt was entertained by the profession, whether equity would not relieve against a purchase of settled estates by a tenant for life; and that doubt was stated as a ground for requiring the aid of parliament, in a petition

(*n*) See 1 Ves. Jun. N. S. 52

for

for an act to enable a sale of settled estates to the tenant for life; which it was conceived could not be done under a power of sale in the settlement. The judges, however, utterly disallowed the doubt to be founded; and reported that no act of parliament was necessary: in consequence of which, many estates of great value have since been purchased by tenants for life, under the usual powers of sale.

The purposes for which estates are vested in trustees for sale, are generally, either for the benefit of creditors; of individuals *sui juris*; or of persons not *sui juris*; and we are now to consider in what manner trustees may become purchasers of estates vested in them for those several purposes, without being liable to be called to account for so doing.

Of purchases by trustees or other prohibited persons in general, it must previously be remarked, that the court will not permit them to give up their office, and to bid; as it would lead to infinite mischief. The *cestuis que trust* themselves, as we shall see, can decide this; and no court can say *ab ante*, they will permit it: for circumstances may exist at the time of the second sale, that the court cannot know (*o*).

(*o*) *Ex parte* James, 8 Ves. Jun. 337.

1. With

1. With respect to a trustee for creditors purchasing the estate himself.

In Whelpdale v. Cookson (*p*), where a trustee for creditors purchased part of the estate himself; Lord Hardwicke said, if the *majority* of the creditors agreed to allow it, he should not be afraid of making the precedent.

But in a late case (*q*), Lord Eldon said, he doubted the authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the court arose from the difficulty of a *cestui que trust* duly informing himself what is most or least for his advantage, he had considerable doubt whether the majority could in that article bind the minority.

It seems therefore, that unless *all* the creditors consent, the purchase cannot be supported: although convenience, and the general rule of transactions by a body of persons, are strongly in favour of Lord Hardwicke's opinion.

2. With respect to a trustee for a person *sui juris*, becoming the purchaser of the estate.

(*p*) 1 Ves. 9; 3 Ves. Jun. 682. N.

(*q*) See 6 Ves. Jun. 628.

In

In Crowe v. Ballard (*r*), where an agent for the sale of a legacy, purchased it himself in the name of a trustee; Lord Thurlow said, that was alone sufficient to set aside the transaction. I was impossible, he said, at any rate, that the person employed to sell could be permitted to buy. *Even if this was done with the knowledge of the party selling, it could not be supported.*

But the rule, as laid down by Lord Thurlow, clearly cannot be supported. The case before his Lordship did not call for it; it being very clear, that if a trustee purchase in the name of another person, the sale will be set aside; as that very circumstance carries fraud on the face of it (*s*). Indeed it may be doubted, whether Lord Thurlow did lay down such a rule; as no mention is made of it, in the report of the same case, by that able and accurate reporter Mr. Vesey, Jun. (*t*).

It must not be understood, that a trustee cannot buy from his *cestui que trust*; but the rule is, that he cannot buy from himself. If, therefore, the *cestui que trust* clearly discharges the trustee

(*r*) 3 Bro. C. C. 117. and see 2 Bro. C. C. 410. n.

(*s*) Lord Hardwicke v. Vernon, 4 Ves. Jun. 411;

(*t*) See 1 Ves. Jun. 215.

from

from the trust, and considers him as an indifferent person, there is no rule which says, that he may not purchase of him, although the court will look with a very jealous eye on a transaction of that nature (*u*): and to be supported, it must clearly appear, that the purchaser, at the time of the purchase, had shaken off his confidential character, by the consent of the *cestui que trust* freely given, after full information; and bargained for the right to purchase (*x*).

8. With respect to a trustee for a person not *sui juris*, buying the estate himself.

The only means by which this can be done, so as to protect the purchase, is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to the court by motion, to let him be the purchaser. This is the only way he can protect himself; and Lord Alvanley said, there are cases in which the court would permit it; as if only 500*l.* was offered, and the trustee will give 1000*l.* (*y*)

It remains to consider what remedy the *cestui*

(*u*) See 6 Ves. Jun. 627.
(*x*) See 8 Ves. Jun. 353.
(*y*) Campbell v. Walker, 5 Ves. Jun. 678.

que trust has, where his trustee has purchased the trust estate in a manner not authorised by the rules of the court.

If the trustee has not sold the estate, the *cestui que trust* may insist on the purchase being avoided, and may reclaim his estate (*z*); for it need not be shewn that the trustee has made an advantage (*a*): or he may require it to be put up to sale again, at the price at which it was bought by the trustee; and that if any one bid more, the trustee shall not have the estate; but if not, that he may be compelled to keep it (*b*).

If, however, the *cestui que trust* be desirous to have the estate put up in lots, and it was bought by the trustee in one lot; the *cestui que trust* must either repay the trustee the purchase-money, with such interest as he would have been liable to pay upon his bargain, he paying an occupation rent for the estate, or he (the *cestui que trust*) must consent to have the estate put up in one lot, on the terms before-mentioned (*c*).

The trustee will, in case of a resale, be

(*z*) See 6 Ves. Jun. 627.

(*a*) See 8 Ves. Jun. 348.

(*b*) *Ex parte* Reynolds, 5 Ves. Jun. 707. *Ex parte* Hughes, *Ex parte* Lacey, and Lister v. Lister, 6 Ves. Jun. 617, 625, 631.

(*c*) *Ex parte* James, 8 Ves. Jun. 337.

allowed

allowed any money *bona fide* laid out in substantial repairs and improvements; which will be added to the amount of the purchase-money, and the estate will be put up at the aggregate sum (*d*).

But no allowance will be made him, for any loss he may sustain by a fall in the funds (*e*).

Formerly, where a purchase by a trustee was set aside, the rule was, to put up the estate again to be sold to the best bidder; the trustee accounting for the profits, and being allowed his principal money and interest at 4 *per cent.* (*f*).

If the trustee has actually sold the estate, the *cestui que trust* may compel the trustee to pay him what he may have received above the original purchase-money (*g*).

Where a trustee buys the trust estate at a fair price, the sale is seldom called in question, unless he afterwards sell it to advantage; and then the *cestui que trust* is of course only desirous, that the money gained by the trustee on the resale should be paid to him.

Owing to this circumstance, a purchaser of a

(*d*) *Ex parte* Hughes, 6 Ves. Jun. 617.

(*e*) *Ex parte* James, *ubi sup.*

(*f*) See Whelpdale v. Cookson, 1 Ves. 9; 5 Ves. Jun. 682. n.

(*g*) Fox v. Mackreth, 2 Bro. C. C. 400. *Ex parte* Reynolds, 5 Ves. Jun. 707.

trust estate, from a trustee who had previously sold to himself, has never, I believe, been implicated in the suit; but it seems clear, that a person purchasing with notice of the previous transaction, would be liable to the same equity as the trustee was subject to. No person, therefore, can be advised to become the purchaser of an estate so circumstanced, unless the *cestui que trust* will join, nor would a court of equity, on any other terms, enforce a specific performance of such a contract.

Before closing this chapter it must be remarked, that if a *cestui que trust* acquiesce for a long time in an improper purchase by his trustee, equity will not assist him to set aside the sale (*h*). In Price v. Byrn (*i*), Lord Alvanley refused the aid of the court, because the bill had been delayed 20 years.

But lachess does not apply to a body of creditors; who may, therefore, claim the aid of equity, at a much more distant period after the sale, than an individual can (*k*).

(*h*) See *Ex parte* James, 8 Ves. Jun. 337.

(*i*) 5 Ves. Jun. 681, cited; and see Norris v. Neve, 3 Atk. 26.

(*k*) Whichcote v. Lawrence, 3 Ves. Jun. 740; and a case before the Court of Exchequer, 6 Ves. Jun. 632, cited.

CHAP-

CHAPTER XIV.

OF JOINT PURCHASES; PURCHASES IN THE NAMES OF THIRD PERSONS; AND PURCHASES WITH TRUST MONEY.

WHERE two or more persons purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be

a lien on the land, and a trust for the representative of him who advanced it (*a*.)

And in all cases of a joint undertaking, or partnership, although the estate will survive at law, yet the survivor will in equity be a trustee for the representative of the deceased partner.

Thus, in a case (*b*) where five persons purchased lands in fee of the commissioners of sewers, and, in order to improve and cultivate these lands, afterwards entered into articles, whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a sum, to be laid out in the manurance and improvement of the land; it was held by the Master of the Rolls, that they were tenants in common, and not joint tenants, as to the beneficial interest, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others who had laid out nothing, go away with the whole. And the decree was affirmed by Lord Chancellor King (*c*).

(*a*) Per Master of the Rolls, *in casu* Lake v. Gibson, 1 Eq. Ca. Abr. 290, pl. 3.

(*b*) Lake v. Gibson, *ubi sup.* and see Hayes v. Kingdome, 1 Vern. 33.

(*c*) Lake v. Craddock, 3 P. Wms. 158.

So,

So, where two persons took a building lease, and laid out money in erecting houses, they were held to be partners with respect to this property; and the survivor was decreed to be trustee of a moiety, for the representatives of the deceased (*d*).

But as the lands will survive at law, equity, on the general rule, that he who seeks equity shall do equity, will not relieve, unless the person seeking relief will do what he equitably ought to do.

Thus in the first-mentioned case, the ancestor of the party seeking relief had quitted the concern for many years; since which time the other proprietors, to enable them to carry on their design, had purchased some other estates, which proved a losing concern; and the plaintiff was only relieved on contributing his share of the purchase-money of the estates so bought, with interest from the time the money ought to have been paid.

If it be doubtful whether the purchasers bought the property to carry on trade, an enquiry will be directed before the master to ascertain the fact (*e*).

Where two or more persons agree for the purchase of an estate in moieties between them, subject

(*d*) Lyster v. Dolland, 1 Jun. 661. Ves. Jun. 431. See 2 Ves. (*e*) See 1 Ves. Jun. 435.

to incumbrances, which are to be discharged out of the purchase-money; the purchase is in equity considered to be made for their equal benefit, *and on a mutual trust between them*; and therefore, although one of them may have abatements made to him by some of the incumbrancers, of sums due for interest, or otherwise, in consideration of services and friendship, and it is expressly agreed to be to his own use, yet equity will compel him to account for the benefit of these advantages (*f*).

If two persons purchase an estate subject to a mortgage, and the mortgage money is apportioned between them, and each of them covenants with the other to pay his share of the money, and to indemnify the other from it; they do not by those means make their personal estate, as between their real and personal representatives, the primary fund for payment of the mortgage money (*g*).

In Wood v. Norman (*h*), the Master of the Rolls held, that where two or more persons purchase an estate, and one, for instance, pays all the money, he cannot call upon those who paid no part of the money to repay him their shares of the pur-

(*f*) Carter v. Horne, 1 Eq. Ca. Abr. 7, pl. 13.

(*g*) Forrester v. Lord Leigh, Ambl. 171. *Vide supra*, p. 75

(*h*) Rolls, 7 and 8 March 1804, MS.

chase-

chase-money, or to convey their shares of the estate to him. For by payment of all the money, he gained neither a lien, nor a mortgage, nor, as was contended, could it be construed a resulting trust; as such a trust could not arise at an after period; and as the relief prayed did not arise out of contract, the only remedy he had, was to file a bill against them for a contribution. He certainly could not follow the estate.

This decision suggests this observation, that where two persons agree to purchase an estate, it should be stipulated in the agreement, that if by the default of either of them, the other shall be compelled to pay the whole, or greater part of the purchase-money, the estate shall be conveyed to him; and he shall hold the entirety against the other and his heirs; unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the mean time.

Where two or more persons purchase an estate, and the conveyance is taken in the name of one of them, the trust may be proved by letters written subsequently to the purchase; for the statute of frauds (*i*) does not require that a trust shall be

(*i*) 29 Car. II. c. 3. s. 7.

created

created by a writing (21); but that it shall be *manifested and proved* by writing, which means that there

(21) This section of the statute has been holden to extend to declarations of uses of fines and recoveries, which, as the statute only requires a writing, it is generally understood may be declared by writing only, without seal either before or after the assurance is made.

Some time after the statute of frauds had passed, a doubt arose, whether, in default of a previous declaration, the resulting use of a fine, or recovery, was not prevented by the act from being limited subsequently to its being levied or suffered. In 2 Blackst. Comm. p. 364, it is stated, that the statute enacted, "that all trusts should be declared in writing *at, and not after*, the time when such trusts were created," and that consequently all subsequent declarations of uses were void. These words, however, are not in the statute, but are only the construction which the act has received in this respect.

But the origin of the doubt is perfectly immaterial, as it was obviated by the statute 4 Ann. c. 16, s. 15, whereby, after reciting that it had been doubted whether, since the making of the 29 Car. II. c. 3, the declarations or creations of uses, trusts, or confidences, of any fines or recoveries *manifested by deed*, made after the levying or suffering of such fines or recoveries, were good and effectual in the law; it is declared, "that all declarations or creations of uses, trusts, or confidences, of any lands, tenements, or hereditaments, manifested and proved, or which hereafter shall be manifested and proved, by any *deed* already made, or hereafter to be made,

there should be evidence in writing, proving that there was such a trust (*k*).

(*k*) Forster v. Hale, 3 Ves. Jun. 696; 5 Ves. Jun. 308. See Riddle v. Emerson, 1 Vern. 108.

But

made, by the party who is by law enabled to declare such uses or trusts, after the levying and suffering of any such fines and recoveries, are, and shall be as good and effectual in the law, as if the said last mentioned act had not been made."

The true meaning of the statute 4 Ann, c. 16, in this respect, seems only to have been, to render valid subsequent declarations of uses, which were apprehended to be void in consequence of the 7th section of the statute of frauds and perjuries; and not to prescribe a form for such declarations, different from the one required by that statute.

This conjecture appears to be warranted by the recital that doubts had arisen whether subsequent declarations of uses manifested by *deed* were effectual; when it is evident, that the doubt which arose could not be as to the validity of subsequent declarations of uses by *deed*; but it must have been as to the power of declaring uses *at all* after the assurance was made. It seems, therefore, that the word "deed" was by mistake inserted for the words "some writing," or for "some deed, or writing."

But even allowing this conjecture to be founded, the words of the statute seem conclusive. And therefore no subsequent declaration of uses of a fine, or recovery, can be valid by virtue of that statute, unless declared by deed; and the authorities

But if two persons enter into a treaty for the purchase of an estate, and one of them desists, and permits the other to go on with the intended purchase, on his promising, by parol, to let him have

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rities in the books to the contrary, (see Hilliard's edition of Shephard's Touch. 519, n.; Saunders on Uses, 184; and Cruise on Uses, 109,) appear to proceed from inattention to the word *deed* in the statute of Ann.

Of course, the uses of a fine or recovery may, previously to the assurance being made, be declared by writing only without seal; unless a deed is required by the rule of law. See Dowman's case, 9 Co.

It has been questioned (Treatise of Equity, 2nd edition, vol. 2, p. 41, n. c.) whether the provision in the statute of Ann extends to *femes covert*.

This was settled in the affirmative very soon after passing the act, (see Bushel v. Burland, Holt, 733, 11 Mod. 197); and it is in every day's practice to make a *feme covert* join with her husband in declaring the uses of a fine or recovery previously levied or suffered.

The case of Bushel v. Burland should not be dismissed without noticing how loosely it is reported. In Holt no notice is taken of the statute of Ann, although the decision evidently turned on the provision therein; and in Mod. Rep. it is said, "The statute of frauds and perjuries is out of the case, for it is *thereby* declared, that all subsequent deeds shall be as they were before. Now it is evident, that instead of the word "thereby," the words "by the statute 4 Ann, c. 16, s. 15," should be inserted.

the

the part of the estate he desired; it seems doubtful whether this agreement can be enforced on account of the statute of frauds.

In Lamas v Baily (*l*), which was a case of this nature, the plaintiff obtained a decree at the Rolls, it being insisted, that although it was an agreement parol, yet it was in part executed by the plaintiff's desisting from prosecuting his purchase, who otherwise might have purchased for himself; or at least have enhanced the price the defendant was to pay, so that the defendant had a benefit by it; and, besides, it was a fraud (*m*), and like the case where a man agreed to purchase as agent for another, and would afterwards retain the purchase to himself. But upon an appeal to the Lord Chancellor, the decree was reversed, as being a parol agreement, within the provision of the statute against frauds.

Mr. Powell (*n*) refers to an anonymous case in Viner (*o*), which he conceives to be another report of the case of Lamas v. Baily, where the Lord Chancellor dismissed the bill, because there

(*l*) 2 Vern. 627.

(*m*) See Thynn v. Thynn, 1 Vern. 296.

(*n*) 1 Powell on Contracts, 310.

(*o*) 5 Vin. Abr. 521, pl. 32. Note, the case of Lamas v. Baily, is stated in the same page.

was

was no *absolute and positive* agreement, but the words were ambiguous and uncertain, and the statute intended to oust as well all such ambiguous agreements, as to prevent perjuries, &c. and this agreement would not bind, unless it were in writing. And Mr. Powell, therefore, conceives, that the judgment turned on there being no *absolute* or *positive* agreement, the words being ambiguous and uncertain; and not on the ground that the forbearing by agreement to do an act might not be a part performance, and raise as strong an equity to have the benefit stipulated in return, as an act done.

And in the later case of Atkins v. Rowe (*p*), some persons desirous of obtaining a lease of three houses, agreed that one of them should bid for all the houses, but that the lease should be for their joint benefit. Accordingly he bid, and a lease was made to him; and to a bill filed by the others to have the benefit of the lease, and that the purchaser might be decreed a trustee, he pleaded the statute of frauds. But the Lord Chancellor seemed of opinion, that the agreement, although by parol, was not within the statute; and ordered the plea to stand for an answer, with

(*p*) Mose, 39. *Sed vide* Crop v. Norton, stated *infra*.

liberty

liberty to except, and the benefit of the plea to be saved to the hearing.

Upon the whole, therefore, the better opinion, perhaps, is, that an absolute agreement of this nature can be enforced, notwithstanding the statute of frauds.

From the case of Smith, treasurer of the West India Dock Company, v. the Mayor and Corporation of London (*q*), it should seem, that where two persons agree to purchase an estate, and one of them, by agreement between them, completes the purchase, and pays the money, the other must agree to accept the title, and pay his share of the purchase-money, before he can call for an inspection of the title-deeds, in order to investigate the title; unless the one who purchased can be charged with such gross negligence, or wilful default, as will strip an agent, as such, of the protection which that character gives him in all transactions in which he duly acts according to his agency: and in case any such gross negligence or wilful default can be proved, the injured party will have a remedy in equity, although he may have paid his share of the purchase-money.

(*q*) Ch. Dec. 16, 1801, and many previous days, MS.

If

If a man purchase an estate, and do not take the conveyance in his own name only, the clear result of all the cases, without a single exception, is, that the trust of the legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly; or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase-money (*r*).

Although the persons in whose name the conveyance is taken, execute no declaration of trust, yet a trust will result for the person who paid the money by operation of law; this species of trust being expressly excepted out of the statute of frauds (*s*).

But, unless the trust arise on the face of the

(*r*) Per Lord C. B. Eyre, in Dyer v. Dyer, stated *infra*.

(*s*) 29 Car. II. c. 3. s. 8; see Gascoigne v. Thwing, 1 Vern. 366; Howe v. Howe, 1 Vern. 415; Anon. 2 Ventr. 361; O'Hara v. O'Neill, 21 Vin. Abr. 497. n. to pl. 7; 2 Bro. P. C. 39; Pelly v. Malden, 21 Vin. Abr. 498, pl. 15; Ambrose v. Ambrose, 1 P. Wms. 321; Smith v. Baker, 1 Atk. 383; Lloyd v. Spillet, 2 Atk. 148; Withers v. Withers, Ambl. 151; Smith v. Lord Camelford, 2 Ves. Jun. 608.

deed

deed itself, the proofs must be very clear (*t*): and however clear they may be, it seems doubtful whether the trust can be decreed against the answer of the trustee (*u*).

It has been said (*x*), that if the consideration money is *expressed* in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such a conveyance to create a presumption that the purchase-money belonged to another, then parol proof cannot be admitted, *after the death of the nominal purchaser*, to prove a resulting trust; for that would be contrary to the statute of frauds and perjuries.

This proposition is not, I conceive, warranted by the authorities referred to in support of it (*y*); and it should seem that the statute is not more broken

(*t*) Gascoigne v. Thwing, 1 Vern. 366; Newton v. Preston, Prec. Cha. 103; Willis v. Willis, 2 Atk. 71; and see 1 Atk. 60; Ambl. 414; Acherley v. Acherley, 4 Bro. P. C. 67; and Smith v. Wilkinson, 3 Ves. Jun. 705, cited; and 1 Dick. 328.

(*u*) Skett v. Whitmore, 2 Freem. 280.

(*x*) See Mr. Saunders's note to Lloyd v. Spillet, 2 Atk. 150; and see his Essay on Uses, 1. 213.

(*y*) Kirk v. Webb, Prec. Cha. 84; Walter de Chirton's case, cited *ibid*; Newton v. Preston, Prec. Cha. 103; Gascoigne v. Thwing, 1 Vern. 366; Hooper v. Eyles, 2 Vern. 480; Crop v. Norton, 2 Atk. 74.

in upon by admitting parol proof after the death of the nominal purchaser, than it is, by allowing such proof in his life time.

An express trust, although by parol only, will prevent the resulting trust (*z*); because resulting trusts are left by the statute of frauds and perjuries as they were before; and previously to the act a bare declaration by parol would prevent any resulting trust. Besides, an equitable presumption may be rebutted by parol evidence (*a*).

Therefore parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially; and if satisfactory, he will be entitled to the estate (*b*); but the proof rests upon him to shew, that the man from whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger (*c*).

Where a man merely employs another person by parol, as an agent to buy an estate, who buys it accordingly, *and no part of the purchase-money is paid by the principal*, and there is no written

(*z*) Lady Bellasis v. Compton, 2 Vern. 294.

(*a*) Langfielde v. Hodges, Lofft. 230.

(*b*) Taylor v. Alston, cited in Dyer v. Dyer, Watk. Copyh. 216; Goodright v. Hodges, *ibid.* 227; Lofft. 230.

(*c*) See 3 Ridg. P. C. 178.

agreement,

agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds (*d*).

And although the agent be afterwards convicted of perjury in denying the trust, yet that will not enable the court to decree a performance *in specie* (*e*), and therefore, as the principal cannot avail himself, in any civil proceeding, of the conviction of the agent, he is a competent witness to prove the perjury (*f*).

In Crop v. Norton (*g*), Lord Hardwicke appears to have been of opinion, that this doctrine of resulting trust only extended to cases where the whole consideration is paid by one person, and the conveyance taken in the name of the other. His Lordship said, "this is where the whole consideration moves from such person; but I never knew it where the consideration moved from several persons; for this would introduce all the mischief which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate

(*d*) Bartlett v. Pickersgill, 4 Burr. 2255; 4 East, 577, n. b. See Rastel v. Hutchinson, 1 Dick. 44.

(*e*) Bartlett v. Pickersgill, *ubi sup.*

(*f*) The King v. Boston, 4 East, 572.

(*g*) 9 Mod, 233.

in the name of one, and the purchase-money appears to be paid by him only, I do not know any case where such persons shall come into this court, and say, they paid the purchase-money; but it is expected there should be a declaration of trust.

Before the statute of uses, if a father made a feoffment to a stranger without any consideration, the law raised an use by implication to himself; but if he made a feoffment to his son, no use did arise to the father by implication; because the blood, which is a sufficient consideration, did fix and settle the estate in the son. And herein the law of trusts doth (as it ought to do) agree with the law of uses before the statute of H. VIII. (*h*).

Therefore, if a father purchase in the name of a child, although illegitimate (*i*), who is without a provision (*k*), or in the joint names of such a child, and of another person (*l*), it will not be deemed a resulting trust for the father, but a gift

(*h*) See Finch, 341.

(*i*) Beckford v. Beckford, Lofft. 490; Fearne's Post-huma, 327; Fonblanque's n. (1) to 2 Trea. Eq. 127.

(*k*) Elliot v. Elliot, 2 Cha. Ca. 231; and see Finch, 341.

(*l*) Lamplugh v. Lamplugh, 1 P. Wms. 112.

or

or advancement for the child (*m*); because a father is under an obligation of duty and conscience to provide for his child in such case. And if the father die without having paid all the purchase-money, his personal estate must pay it for the benefit of his child (*n*).

Where, by the custom of a manor, copyholds are granted for lives *successive*, it has been holden, that if the father pay the fine, a grant to children, as nominees, shall not be an advancement for them, but a trust for the father (*o*); and there seems some ground to support this distinction; because the father could not have taken the whole estate in his own name.

But this decision has been overruled, and it is now settled, that such a purchase is, upon the general rule, an advancement for the children, and not a trust for the father (*p*).

(*m*) Lady Gorge's case, 3 Cro. 550, cited; Lord Grey v. Lady Grey, 1 Cha. Ca. 296; Finch, 238; Jennings v. Selleck, 1 Vern. 467; Mumma v. Mumma, 2 Vern. 19; Shales v. Shales, 2 Freem. 252; 1 Eq. Ca. Abr. 382, pl. 9; Anon. 2 Freem. 128, pl. 151; Taylor v. Taylor, 1 Atk. 386.

(*n*) Redington v. Redington, 3 Ridgway's P. C. 106.

(*o*) Dickenson v. Shaw, cited in Dyer v. Dyer, Watk. Copyh. 216.

(*p*) Dyer v. Dyer, *ubi sup.*

A purchase by a Papist, incapable of purchasing in the name of a Protestant son, is a stronger case for an advancement than a purchase by a Protestant parent; because otherwise a constructive trust prohibited by statute would be raised (*q*).

It hath already been observed, that to make it an advancement, the child must be unadvanced; a child having only a reversion expectant upon a life estate, will be considered as unadvanced (*r*); and even if the child be advanced, yet if the father consider him unadvanced, that will be sufficient (*s*).

If the child is already provided for, and the father did not consider him unadvanced (*t*), or if the father considered the child, from the first, as a trustee for him, he will be held to be so (*u*); but the proof of this lies on the side of the person wishing to defeat the child's claim; and it seems, that although parol evidence of verbal declaration is admissible in support of the deed, it is inadmissible

(*q*) Redington v. Redington, 3 Ridg. P. C. 106.

(*r*) Lamplugh v. Lamplugh, 1 P. Wms. 112.

(*s*) Redington v. Redington, *ubi sup.*

(*t*) Elliot v. Elliot, 2 Cha. Ca. 231.

(*u*) Woodman v. Morrell, 2 Freem. 32.

to

to create a trust against it (*x*). If the proofs are pretty equal on each side, equity will not relieve against the child (*y*).

Possession by the father, during the infancy of his child (z), will not be deemed subversive of the child's claim; for it cannot be supposed the parent would have named a youth as a trustee; and therefore his taking the profits must be intended to have been done by him as guardian to the son. In an early case (*a*), indeed, the tender years of the child was considered as evidence that the father did not purchase for his benefit; as he was too young to need an advancement.

A distinction has been drawn where the parent has taken the profits after the child's coming of age, and when of discretion to claim his right (*b*); in which case, it is said, the child shall be a trus-

(*x*) Lamplugh v. Lamplugh, 1 P. Wms. 111; Redington v. Redington, 3 Ridg. P. C. 106.

(*y*) Shales v. Shales, 2 Freem. 252; Redington v. Redington, 3 Ridg. P. C. 106.

(*z*) See Finch, 340, 341; Lamplugh v. Lamplugh, 1 P. Wms. 112; Mumma v. Mumma, 2 Vern. 19; Redington v. Redington, 3 Ridg. P. C. 106. Note, the case of the Attorney General v. Bagg, Hard. 125, turned on fraud.

(*a*) Sir George Binion v. Stone, Nels. Cha. Rep. 68; 2 Freem. 169.

(*b*) Loyd v. Read, 1 P. Wms. 608; and see Gilb. Lex Prætoria, 271.

tee for the father. But this cannot be depended on. It seldom happens that the father gives the son possession during his life, and yet, as the court observed in the case of Lord Grey v. Lady Grey (*c*), in all cases whatsoever, where a trust shall be between the father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain and coherent and binding evidence; and not by any argument or inference from the father's continuing in possession, and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is advanced but in part.

So the circumstance of the parent laying out money in repairs and improvements, will not make the child a trustee (*d*).

A declaration of trust by the father, *subsequently* to the conveyance, will not divest the gift to the child (*e*); and therefore a devise by him of the estate will be inoperative (*f*).

The general rule of equity would, it is conceived, warrant an assertion, that if the father devise the

(*c*) Finch, 338.

(*d*) Shales v. Shales, 2 Freem. 252; Mumma v. Mumma, 2 Vern. 19.

(*e*) Elliot v. Elliot, 2 Cha. Ca. 231.

(*f*) Mumma v. Mumma, 2 Vern. 19; Dyer v. Dyer, Watk. Copyh. 216.

estate,

estate, and make other provision for the child by the will, he would be put to his election; but in the case of Shales v. Shales (*g*), where these circumstances occurred, the child was not put to his election.

If a conveyance of a fee to a son is proved to be for a particular purpose, as to sever a joint-tenancy, the child will be a trustee for the father (*h*).

A purchase by a father, in the joint names of himself and son, will be considered as an advancement for the child, if he is unprovided for; and consequently equity will not assist to defeat his legal claim (*i*).

But a purchase in the names of father and son, as joint-tenants, has not been considered so strong a case for an advancement as it formerly was; because it does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division, and to a moiety absolutely, even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay, if the son dies

(*g*) 2 Freem. 252.

(*h*) Baylis v. Newton, 2 Vern. 28; and see Birch v. Blagrave, Ambl. 264.

(*i*) Scroop v. Scroop, 1 Cha. Ca. 27; Taylor v. Taylor, 1 Atk. 386.

during

during his minority, the father would be entitled to the whole, by virtue of the survivorship, and the son could not have prevented it by severance, he being an infant (*k*).

And in a case (*l*) where a father purchased an estate in the names of himself and son, a judgment creditor was relieved, in equity, against the survivorship at law; the settlement being considered as voluntary and fraudulent against creditors (*m*).

A purchase in the name of a child solely, or jointly with the parent's name, is not however within the 27 Eliz. (*n*). And therefore a subsequent purchaser, although *bona fide* and without notice, will not be relieved against it (*o*).

But such a purchase is expressly within the letter of the 21 of James the Ist. (*p*) if the father be a trader at the time; and his being solvent will not protect the purchase (*q*). But if the purchase be made before the father engages in trade, and without any fraudulent purpose of becoming

(*k*) Per Lord Hardwicke, 2 Atk. 480; and see Pole v. Pole, 1 Ves. 76. Qu. The weight of these reasons?

(*l*) Stileman v. Ashdown, 2 Atk. 477.

(*m*) See 13 Eliz. c. 5.

(*n*) C. 4.

(*o*) Lady Gorge's case, 3 Cro. 550, cited.

(*p*) Walker v. Burrows, 1 Atk. 94.

(*q*) Fryer v. Flood, 1 Bro. C. C. 160.

a bankrupt,

a bankrupt, it will be good, although the father afterwards commence tradesman, and is made a bankrupt (*r*).

If the father be dead, a purchase by the grandfather, in the name of his grandchild, is subject to the same rules as govern a purchase by a father in the name of his child; for on the death of the father, the grandchild is under the protection of the grandfather (*s*); but in Loyd v. Read (*t*), this distinction does not seem to have been attended to.

So, a purchase by a husband in the name of his wife, is also deemed an advancement and provision for her (*u*); although if the purchase be after marriage and voluntary, it may, perhaps, be fraudulent as against creditors (*x*).

And a purchase by a trader in the name of his wife, seems subject to the same rules as a purchase by a trader in the name of his child (*y*).

(*r*) Crisp v. Pratt, Cro. Car. 548; Lilly v. Osborn, 3 P. Wms. 298.

(*s*) Ebrand v. Dancer, 2 Cha. Ca. 26.

(*t*) 1 P. Wms. 608.

(*u*) Kingdome v. Bridges, Back v. Andrews, 2 Vern. 67, 120.

(*x*) Christ's Hospital v. Budgin, 2 Vern. 683. *Sed vide* Fletcher v. Sidley, 2 Vern. 490; and 8 Ves. Jun. 199.

(*y*) See Glaister v. Hewer, 8 Ves. Jun. 195; 1 Ves, Jun. N. S. 12.

On-

On this subject it remains only to remark, that Lord Chief Baron Gilbert observes (z), a difference is taken between a purchase in the name of a son and of a daughter; for though sons are often provided for by settlement of lands, yet daughters seldom are, therefore the presumption is not so strong.

If a trustee, or executor, purchase estates with his trust money or assets, and take the conveyance in his own name, without the trust appearing on the face of the deeds, the estates will not be liable to the trusts, although he die insolvent, unless the application of the purchase-money is clearly proved.

In the old cases (*a*) equity was much more strict in the proof they admitted of the application of the money, than they now are; but it was always very clear, that upon sufficient proof of the trust money having been laid out in the purchase of the estate, a trust would result, and be decreed accordingly (*b*).

(z) Lex Prætoria, 272. *Sed Qu.* *Et vide* Lady Gorge's case, 3 Cro. 550, cited.

(*a*) Kirk v. Webb, Prec. Cha. 84; Heron v. Heron, Prec. Cha. 163; Halcott v. Markant, Prec. Cha. 168; Kindar v. Milward, Prec. Cha. 171; 2 Vern. 440.

(*b*) Anon. Sel. Cha. Ca. 57; Lane v. Dighton, Ambl. 409; Balguey v. Hamilton, cited *ibid*; Ryall v. Ryall, 1 Atk. 59; and see Earl of Plymouth v. Hickman, 2 Vern. 167.

Where

Where a trustee is bound by the trust to lay out the money in land, if he lay it out accordingly, it will be presumed to have been done in execution of the trust.

Thus in Bennet v. Mayhew (*c*), where a steward had laid out monies remitted to him to make purchases, in his own name; Lord Hardwicke thought the property so purchased liable, and that the steward should be presumed to have meant to do the just and honest thing.

But if a trustee has considered himself entitled to the trust money for his own benefit, no presumption can be raised in opposition to this fact, that he intended any lands he may have bought with the trust money to be subject to the trust (*d*).

(*c*) 1 Bro. C. C. 232, cited; Prec. Cha. 104. S. P.; and see Sowden v. Sowden, 1 Bro. C. C. 582.

(*d*) Perry v. Phelps, 4 Ves. Jun. 108.

CHAPTER XV.

OF THE PROTECTION AND RELIEF AFFORDED TO PURCHASERS BY STATUTES, AND BY THE RULES OF EQUITY.

In the former chapters an attempt has been made to trace the purchase from its inception by contract, to its completion by conveyance; the subjects which may be said to arise out of the conveyance, have been treated on; and it hath been considered, who are incapable of purchasing estates. Let us now suppose the purchase completed, and proceed to enquire to what protection and relief purchasers are entitled. The protection and relief afforded to purchasers, appear to arise either from positive statutes, or from the rules of equity. The common law hath, indeed, done all which, from its peculiar nature, it can do in support of the claims of *bona fide* purchasers. For we are told, that the maxims of the common law, which refer to descents, discontinuances, non-claims, and to collateral warranties,

are

are only the wise arts and intentions of the law to protect the possession, and to strengthen the rights of purchasers (*a*). In Keech v. Hall (*b*), Lord Mansfield said, the idea that the question in that case might be more proper for a court of equity, went upon a mistake. It emphatically belonged to a court of law, in opposition to a court of equity; for a lessee at a rack rent is a purchaser for a valuable consideration; and in every case between purchasers for a valuable consideration, a court of equity must *follow* and not *lead* the law.

Had Lord Mansfield continued much longer in the administration of the justice of this country, or had he obtained his wish in nominating Mr. Justice Buller as his successor in the high office which he held (*c*), it is to be feared that the rules of law and equity, which from the peculiar constitution of this country ought ever to continue distinct, would have been totally confounded (*d*); and the unpleasing task of tracing the decisions arising from this unnatural commixture, would

(*a*) Finch, 104. See Bac. Rea. 36.

(*b*) Doug. 22; and see Weakly v. Bucknell, Cowp. 473.

(*c*) See Mr. East's preface to his Treatise of the Pleas of the Crown.

(*d*) This practice did not escape the inquiring eye of Junius. See vol. 2. 41, 194.

now

now devolve upon us. But great judges have disapproved of the adoption of equitable rules in a court of law (*e*), and Lord Eldon's elaborate judgment in Evans v. Bicknell (*f*), upon which I could dwell with pleasure, so plainly evinces the tendency of the practice to shake titles in general, that we may fairly hope it never will be revived. We need therefore only consider, first, the statutes which have been passed for the protection or relief of purchasers; and secondly, the rules of equity in favour of purchasers.

First then. By the 27 Eliz. c. 4 (*g*), it is enacted, that all conveyances, grants, &c. out of any lands, tenements, or other hereditaments, to be had or made *for the intent and of purpose to defraud and deceive* such persons as shall purchase the same lands, tenements, or other hereditaments, so formerly conveyed, granted, &c. or any rent, profit, or commodity in or out of the same, shall be deemed and taken only as against such persons and their representatives as should so purchase, for money or other good consideration, the same lands, tenements, or other

(*e*) See 5 East, 138. 1 Bos. and Pull. 162.

(*f*) 6 Ves. Jun. 174; and see Johnson v. Johnson, 3 Bos. and Pull. 162.

(*g*) Made perpetual by 39 Eliz. c. 18, s. 3.

hereditaments,

hereditaments, or any rent, profit, or commodity in or out of the same, to be utterly void.

But it is provided, that the act shall not extend to make void any conveyance, &c. to be made for good consideration, and *bona fide*, to any person.

And it is also enacted, that if any person shall make any conveyance, &c. of any lands, tenements, or hereditaments, with any clause of revocation or alteration at his pleasure, of such conveyance, &c. and shall afterwards sell the same to any person or persons for money or other good consideration paid or given (the said first conveyance, &c. not being revoked), then the said first conveyance, &c. as touching the lands, tenements, and hereditaments so after sold, against the vendees, &c. shall be deemed and be void, and of none effect.

To take advantage of this statute, a person must have purchased *bona fide*, and for a valuable and not inadequate consideration (*h*).

In the construction of this act it hath been holden (*i*), that notice to a purchaser of a fraudu-

(*h*) Upton v. Bassett, Cro. Eliz. 444; Doe v. Routledge, Cowp. 705.

(*i*) Gooch's case, 5 Co. 60 a.

lent conveyance is of no consequence, as the statute makes it absolutely void.

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within this statute, against a subsequent purchaser for valuable consideration (*k*).

But if the conveyance were made with an honest intent, and the purchaser had notice of the trust, it seems he will not be relieved against it (*l*). And upon the whole, as Mr. Roberts justly remarks (*m*), these are cases of such danger to purchasers, that a prudent adviser can hardly recommend a title, which has been at all the subject of arrangements for the payment of debts remaining unsatisfied.

It has in numerous cases been holden, that voluntary settlements are within the meaning of the act, although the purchaser had direct notice of the settlement at the time of his purchase. This doctrine has, however, been frequently questioned, but appears to have been incontrovertibly settled

(*k*) Leech v. Leech, 1 Cha. Ca. 249.

(*l*) Langton v. Tracey, 2 Cha. Rep. 16. See Stephenson v. Hayward, Prec. Cha. 310.

(*m*) Vol. Conv. 335.

by

by the case of Taylor v. Stile (*n*), which arose in Yorkshire.

In that case, A. settled lands, after his marriage, on his wife, for life; and then sold the lands to B. who had notice of the wife's estate for life, and took counsel's opinion on the point. A. died, and his wife brought her bill to be let into her life estate. Lord Northington held the law to be clear, that a subsequent purchaser for a valuable consideration, though with notice, should set aside a voluntary settlement; but it being suggested, that there was no valuable consideration, an issue was directed to try that fact, which coming on before Mr. Justice Bathurst, at York, he suffered the counsel to enter into the equity, and after hearing the argument, said he knew Lord Hardwicke had determined, in twenty instances, in the same manner as Lord Northington. The consideration was proved, and the cause came on to be heard before the Chancellor on the equity reserved, who thereupon dismissed the bill.

With respect to the decisions on voluntary settlements, I cannot refrain from observing, that they appear to militate against the spirit of the act, when the purchaser has *direct notice* of the

(*n*) Chancery, 1763, MS.

voluntary settlement from the vendor. The material ingredients, "*the intent and purpose to defraud and deceive*," are wanting, and the purchaser is not the innocent, injured man, whom the statute presumes him to be (*o*).

Although a deed be fraudulent in its creation, and voidable by a purchaser (i. e. would become void by a person purchasing the estate), yet it may become good by matter *ex post facto:* as if a man make a feoffment by covin, or without any valuable consideration, and the feoffee make a feoffment for valuable consideration, and then the first feoffor enter and make a feoffment for valuable consideration; the feoffee of the first feoffee shall hold the lands, and not the feoffee of the first feoffor: for although the estate of the first feoffee was in its creation covinous, or voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such person shall be preferred before the last (*p*).

(*o*) See White v. Stringer, 2 Lev. 105; Fonbl. n. (g) to 1 Trea. Eq. 269. *Sed vide* Roberts on Vol. Conv. 39—44.

(*p*) Prodgers v. Langham, 1 Sid. 133; Andrew Newport's case, Skin. 423; Wilson v. Wormal, Godb. 161, pl. 226; and see Parr v. Eliason, 1 East, 92.

Indeed

Indeed cases of this nature are expressly saved out of the statute by the proviso.

Lord Eldon has applied this rule to persons having only equitable rights. For where a person who had an absolute power of appointment over a sum of money to be raised under a trust term, directed part of it to be raised in favour of a volunteer, who afterwards mortgaged such part, although the money appointed was deemed assets as between the creditors of the appointor and the appointee, yet the claim of the purchaser was preferred to that of the creditors; he having a preferable equity (*q*).

If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of such provision, the deed, though void in its creation as to purchasers, will, on the marriage being solemnised, no longer remain voluntary, as it was in its creation, but will be considered as made upon valuable consideration (*r*).

This rule has lately received a very liberal, and

(*q*) George v. Milbanke, 1 Ves. Jun. N. S. 190.

(*r*) Prodgers v. Langham, 1 Sid. 133; Kirk v. Clark, Prec. Cha. 275; Doe v. Routledge, Cowp. 705; East India Company v. Clavell, Prec. Cha. 377; and see 1 Ves. Jun. N. S. 193.

seemingly proper construction. It has been holden (*s*), that though it does not appear, that the friends of the wife did speculate upon the provision, and take it into consideration, it must be presumed they did act upon it; and it cannot afterwards be disturbed.

Notwithstanding the decision in Taylor v. Stile, it is seldom that a purchaser can be advised to accept a title where he has notice of a prior voluntary settlement: for it may be very difficult to prove it voluntary (22); besides, it may have been rendered valid by matter *ex post facto*: and, as the voluntary settlement is binding on the vendor, it seems clear, that a court of equity would not enforce a specific performance of such a contract, if the purchaser were unwilling to complete his purchase.

(*s*) Brown v. Carter, 5 Ves. Jun. 862.

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(22) In Ferrars v. Cherry, 2 Vern. 384, where the purchaser had notice of a settlement apparently voluntary, but which was made for valuable consideration, he was held to be bound by it, as he ought to have enquired the fact: but in Senhouse v. Earle, Ambl. 285, Lord Hardwicke denied this to be law, and said he was inclined to think it was left uncertain on the face of the settlement, whether it was made before marriage or not. See 2 Ves. 60. n.

In

In Bennet v. Musgrove (*t*), Lord Hardwicke said, the distinction in equity was, that where a subsequent purchaser for a valuable consideration would recover the estate, and set aside or get the better of a precedent voluntary conveyance, if that conveyance was fairly made, without actual fraud, the court will say, take your remedy at law: but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment, and recover the possession, they may come into this court to set aside that conveyance: which is a distinction between actual and presumed fraud, from its being merely a conveyance.

From this it seems clear, that equity would not compel a specific performance in favour of a purchaser, who bought with notice of a prior voluntary conveyance made without fraud; although equity will enforce a performance *in specie*, if the purchaser had no notice of the existence of the settlement (*u*).

In the statute of charitable uses (*x*) is a proviso, that no person who shall purchase or obtain,

(*t*) 2 Ves. 51.

(*u*) Leech v. Dean, 1 Cha. Rep. 78; Otley v. Lee, Reg. Lib. 1736, fol. 188, cited in Roberts, Vol. Conv. 234; and see Parry v. Carwarden, 2 Dick. 544.

(*x*) 43 Eliz. c. 4.

upon valuable consideration of money or land, any estate or interest of or in any lands, &c. that shall be given to any of the charitable uses mentioned in the statute, without fraud or covin, (having no notice of the same charitable uses) shall be impeached by any decrees of the commissioners therein mentioned (23).

A purchaser who hath bought for an inadequate consideration is not within this proviso; and the adequacy of the consideration is measured according to the rule of the civil law (*y*).

If a rent charge be granted out of land to a charitable use, and the land is afterwards sold for valuable consideration to one who had no notice, it has been said, the rent remains; because the purchase was of another thing that was not given to the charitable use (*z*): but, in Tothil (*a*), the same case is referred to as an authority, that a purchaser coming in without notice of a rent charge shall not be chargeable therewith, although

(*y*) *Vide supra*, p. 109; Duke, 177.

(*z*) East Greensted's case, Duke, 64.

(*a*) 258.

(23) It is observable that this is the only statute passed in favour of purchasers, in which they are required to have no notice.

given

given to a charitable use. And this seems the better opinion.

If the first purchaser gave a valuable consideration, and yet had notice, all that claim in privity under the estate and title, whether they have notice or not, will be bound by the decrees of the commissioners (*b*).

This rule, as we shall hereafter see, differs from the general rule of equity in this respect:—a subsequent purchaser without notice, not being affected by notice in the person of whom he purchased.

With this exception, however, the same rules seem to prevail in the construction of the act, with respect to notice, as are generally adopted by equity (*c*).

By the statute 13 Eliz. c. 7, a purchaser would be defeated, although there should be forty years after an act of bankruptcy, and before a commission; and although the purchaser had no notice; for the words of the statute are general *after bankruptcy*, and the proviso in the end of the statute makes it still plainer, viz. *That assurances made by a bankrupt before bankruptcy, and bona*

(*b*) East Greensted's case, Duke 64; and see *ibid.* 173.

(*c*) East Greensted's case, *ubi sup.*; and Duke, 180.

fide,

fide, shall not be defeated.—This was hard doctrine against fair purchasers without notice; but so the law was (*d*).

With a view to prevent this injustice, and at the same time to preserve creditors their just rights, and perhaps in analogy to the statute of fines, it was by the 21 Jac. I. c. 19, s. 14, enacted, that no purchaser for good and valuable consideration should be impeached by virtue of that act, or any other act theretofore made against bankrupts, unless the commission to prove him a bankrupt should be sued forth against such bankrupt within five years after he should become a bankrupt.

It has been decided, that if a purchaser has notice of the act of bankruptcy, he is not a purchaser within the meaning of the statute, and consequently is not entitled to the benefit of it (*e*): but if the act of bankruptcy arise by the execution of a fraudulent deed, notice of the deed, without notice of the fraud, will not be deemed notice of the bankruptcy (*f*).

To avoid a purchase, the act of bankruptcy must be committed within five years before the sale,

(*d*) See Forrester, 66.

(*e*) Read v. Ward, 2 Eq. Ca. Abr. 119; 7 Vin. Abr. 119.

(*f*) S. C.

and

and also before the commission (*g*). The five years are, however, computed from the last act of bankruptcy preceding the sale; for the words of the statute are not after he shall *first* be a bankrupt, but only, after becoming bankrupt generally (*h*): and, therefore, if after several acts of bankruptcy an estate is sold by the bankrupt, and a commission issues within five years from the last act, the sale will be avoided (*i*). But no act of bankruptcy after the sale will affect the purchaser; and, consequently, his title will not be impeached by any commission issued after five years from the act of bankruptcy immediately preceding the sale (*k*).

By a fiction in law, all judgments were supposed to be judgments of the first day of the term in which they were obtained; and, therefore, a purchaser might have his estate incumbered by a judgment acknowledged subsequently to his purchase.

To obviate this injustice it was enacted (*l*), that

(*g*) Radford v. Bloodworth, 1 Lev. 13.

(*h*) Spencer v. Venacre, 1 Keb. 722.

(*i*) Jellif v. Horn, 1 Keb. 12, cited; Radford v. Bloodworth, 1 Lev. 13; 1 Keb. 11.

(*k*) Spencer v. Venacre, 1 Keb. 722; and see Cullen's B. L. 241.

(*l*) 29 Car. II. c. 3, s. 14, 15.

any

any judge, or officer of any of his Majesty's courts of Westminster, that should sign any judgments, should at the signing of the same set down the day of the month and year of his so doing, upon the paper book, docket or record, which he should sign; which day of the month, and year, should also be entered on the margin of the roll of the record where the said judgment should be entered, and such judgments, as against purchasers *bona fide* for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, should in consideration of law be judgments only from such time as they should be so signed, and should not relate to the first day of the term whereof they were entered, or the day of the return of the original, or filing the bail.

But though this settled all differences respecting the fiction of law, whereby judgments were supposed to be all of the first day of the term, by compelling the party to set down the particular period when the judgment was signed, and declaring that, as against purchasers *bona fide* for a valuable consideration, the lands, tenements, and hereditaments, to be charged thereby, should be charged only from such time as the judgment was signed; yet inasmuch as it did not compel the plaintiff to

carry

carry in the judgment roll, purchasers and others were rendered almost incapable of discovering what judgments were recovered (*m*).

And therefore by another statute (*n*) it was enacted, that all judgments should be doggetted and entered in the manner therein mentioned; and that no judgments should affect lands or tenements as to *bona fide* purchasers for valuable consideration, unless doggetted and entered according to the act.

Although a judgment is not duly doggetted, and therefore void against a purchaser, yet if the purchaser has notice of it, and an allowance is made for it out of the purchase-money, equity will compel him to pay it (*o*).

The general rule of equity would warrant an assertion, that the case would be the same although no allowance were made. The case of Forshall v. Coles (*p*), however, at first sight appears to convey a different opinion; but on examination it will be seen, that the case turned upon an agree-

(*m*) Robinson v. Harrington, 1 Pow. Mortg 415.

(*n*) 4 and 5 W. and M. c. 20, made perpetual by 7 and 8 W. III. c. 36, s. 3.

(*o*) Thomas v. Pledwell, 7 Vin. Abr. 53, pl. 5; 2 Eq. Ca. Abr. 684, pl. 7.

(*p*) 7 Vin. Abr. 54, pl. 6; 2 Eq. Ca. Abr. 592, pl. 8.

ment

ment between the plaintiff and defendant; and that it does not impugn the general doctrine.

Formerly if goods had been sold during long vacation; a *fieri facias* tested the preceding term would have overreached the sale although issued subsequently to it (*q*).

To remedy this inconvenience it was enacted (*r*) that no writ of *fieri facias*, or other writ of execution, should bind the property of *goods* against whom such writ of execution was sued forth, but from the time that such writ should be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, should upon the receipt of any such writ, without fee for doing the same, indorse upon the back thereof the day of the month or year whereon he or they received the same.

It has been said (*s*), that the whole intention of this provision, was to secure purchasers, under a second execution, against any former writ which

(*q*) Houghtone v. Rushley, Skin. 217; and see Comb. 145; 2 Ventr. 218.

(*r*) 29 Car. II. cap. 3. s. 16.

(*s*) Per Ashurst J. *in casu* Hutchinson v. Johnson, 1 Term Rep. 751.

might

might have been delivered to the sheriff. But a purchaser under a second execution was always protected against any prior writ of which he had no notice, by the rule of law, independently of the statute of frauds (*t*); and the reason already given appears to be the correct one.

It has been doubted whether the word "goods," in the act referred to, extends to leaseholds; and it appears by two opinions (24) published in

(*t*) See Smallcomb v. Buckingham, 1 Lord Raym. 251; Carth. 419.

Rigge's

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(24) Mr. Serjeant HILL's Opinion:

"I incline to think that the judgment is a lien upon the estate. It would certainly be so if Mr. K's house was a freehold: but I suppose it is only a leasehold for years, and if so I think it is a doubtful point whether the judgment is a lien upon it; but I incline to think it is. Before the statute of West. 2. 13th Edw. I. 1 ch. 18. no subject could on a judgment have execution of the lands of the defendant against whom the judgment was obtained, except in some special cases (2 Inst. 394); but by that statute, the plaintiff may elect to have a writ of execution of a moiety of the defendant's lands; and though the statute mentions lands generally, yet it extends to land in which the defendant has a term for years, 2 Inst. 396, l. 1. 2. And it is at the option of the plaintiff either to have the term sold, or to have it extended, 8 Co. 171.

Rigge's observations on registry, that Mr. Serjeant Hill thought it did not include leaseholds, but

171. The form of the writ of execution founded on this statute, is a command to the sheriff, 'to cause to be delivered to the plaintiff, at a reasonable price or extent, a moiety of the defendant's lands and tenements in his bailiwick, whereof the defendant on such a day (being the day on which the judgment was given) was seised; to hold the said moiety to the said plaintiff, &c.' The word seised in the writ is not properly applicable to a leasehold for years, but still the authorities are that a lease for years may be extended on an elegit; and those authorities have never been contradicted: consequently this estate of Mr. K's, though he has only a leasehold, may be extended, pursuant to the command of the writ of elegit, if any should issue on the judgment, notwithstanding he should alien it before the writ issued; because the command of the writ is to extend a moiety of all the lands he had on the day the judgment was given; and this form has continued since the statute of frauds, 29 Car. II. c. 3. Yet the doubt I have arises on the 16th section of that act, by which it is enacted, 'that no writ of execution shall bind the property of goods against whom such writ of execution is sued forth, but from the time such writ is delivered to the sheriff, under-sheriff, or coroners to be executed.' A term for years is a chattel real, and sometimes comprehended under the word goods: and if it be so in that statute, then a *bona fide* sale before the writ of execution is delivered to the sheriff would be good against the execution; and so was the opinion of the Lord-Keeper in the case of an extent

but that they might be extended on a writ of *elegit* (*u*); and consequently were bound from

(*u*) And see Mr. Serjeant Williams's n. to 2 Saund. 68 e. 68 f.

the

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extent upon a statute 1 Vern. 294, and of the court in 2 Vern. 390; and Chan. Pre. 125; in the case of an extent at the suit of the crown, which in most cases reaches further than the subject's execution. But these are not the same with an elegit on the statute West. 2, and therefore not in point; for in the case of an execution by *fieri facias*, or any other execution only against goods, they, before the statute of frauds, related to the award of execution, 2 Rol. Abr. 157; and since the statute in the subject's case, only to the time the writ is delivered to the sheriff to be executed: but the elegit relates to the judgment, as appears by many authorities, and the form of the writ, and therefore I incline to think that the statute has not altered the law with respect to an elegit, founded on the statute West. 2; but that the same still relates to the judgment, if doggetted as required by statutes later than any of the above.

"G. HILL.

"Linc. Inn, July 27, 1790."

Mr BUTLER's Opinion:

"By the 29th Car. II. c. 3. s. 18, it is enacted, 'that no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods of the person against whom such writ of execution shall be sued, but from the time such execution shall be delivered to the sheriff to be executed.'

the time the judgment was duly entered and doggetted; and that, on the other hand, Mr. Butler thought the word "goods" did comprise leaseholds, which therefore were not bound until delivery to the sheriff of the writ of execution.

The position that a leasehold for years may be extended on an *elegit*, seems fallacious. It is certainly so stated by Coke, in Sir Gerard Fleetwood's case (*x*), but on examination it will be found, that the authorities (*y*) cited by him do not warrant his assertion. The words of the act, upon which the writ of elegit is founded, are, "*quod vicecom. liberet ei* (the creditor) *omnia cattalla debitoris (exceptis bobus et afris carucæ) et medietatem terræ suæ, quosque debitum fuerit levatum per rationabile pretium et extentum.*" Now it is admitted by Coke himself (*z*) that *pretium* refers to goods and

(*x*) 8 Co 171. (*y*) 31 Ass. p. 6; 38 Ass. p. 4.
(*z*) 2 Inst. 395.

In the present case, therefore, if the writ of execution was not delivered to the sheriff before the assignment to J. K. the property was not subject to it. Whether the writ was or was not delivered to the sheriff, may be known by searching at the sheriff's office.

"CHARLES BUTLER.
"Linc. Inn, 12th April, 1791."

chattels,

chattels, and *extentum* to lands; and this appears from the form of the writ; which only speaks of the lands and tenements (*a*) of which the debtor was *seised*. Indeed the case of Sir Gerard Fleetwood is itself subversive of Sir Edward Coke's assertion, as it settled that a sale of chattels was good after judgment, although not after execution awarded (*b*); when it is evident, that if a term could be extended, the command to the sheriff would overreach the sale in the same manner as it does in the case of a freehold estate.

With respect to judgments, the statute of frauds hath two branches: the one relating to judgments against real estate; the other relating to executions on judgments against goods or personal estate. The act being a remedial one, the mode of discovering whether leaseholds are bound by the last provision, seems to be, first, an enquiry whether purchasers of leaseholds were within the mischief the legislature intended to guard against; and if they were, then an enquiry whether the word "goods" is sufficiently comprehensive to effectuate the intention of the act.

(*a*) See 1 Bro. 266 b. pl. 13.

(*b*) And see 1 Fitz. Abr. tit. Execution, pl. 108; 2 Ro. Abr. 157; Wilson v. Wormal, Godb. 161, pl. 226; Shirley v. Watts, 3 Atk. 200.

First then, the act was passed for the quiet and in favour of purchasers, and admitting (as I think we must) that leaseholds could not be extended on an *elegit*, but were only bound from the award of execution, it is evident that the first provision in the act could not apply to leaseholds; which were therefore clearly within the mischief intended to be guarded against by the second provision, as a sale of them was liable to be overturned by a writ awarded in vacation, and tested the preceding term; and if we do not hold leaseholds to be within the operation of this branch of the act, the consequence is, that purchasers of them are still obnoxious to the danger the statute intended to prevent.

Assuming that leaseholds are within the meaning, it remains to inquire, whether they are within the words of the act. This depends upon the construction which the word "goods," as used in the act, ought to receive.

Biens bona, Sir Edward Coke says (*c*), includes all chattels as well real as personal. *Chattels*, he adds, is a French word, and signifies goods, which by a word of art we call *catalla*. And this, as Sir William Blackstone observes (*d*), is true, if understood

(*c*) Co Litt. 118 b. (*d*) 2 Comm. 385.

derstood of the Norman dialect, for in the *Grand Coustumier* (*e*) we find the word *chattels* used and set in opposition to a fief or feud, so that not only goods, but whatever was not a feud, were accounted chattels; and the learned commentator is of opinion, that our law adopts it in the same large, extended, negative sense.

This opinion appears to be correct, if confined to the word *chattels*; but it must not be extended to the word *goods*, which, in our law, certainly has a more confined operation.

By the civil law, however, *bona* includes all chattels, as well personal as real; and therefore a general bequest of all one's goods will pass a leasehold (*f*), because the civil law guides the construction of bequests of personalty; but it seems very clear, that in an assignment, which must be construed according to the rules of the common law, a leasehold will not pass under the word *goods* (25).

It

(*e*) C. 87. (*f*) Portman v. Willis, Cro. Eliz. 886.

(25) This was decided in 4 Ed. VI. but in Portman v. Willis, *ubi sup.* Gawdy was of opinion, against Popham and Clench, that a grant of *omnia bona mobilia et immobilia*, would

It is evident, therefore, that in some cases that word will include leaseholds, while in others it will not; and the true rule to discover what sense was affixed to it in the statute of frauds, seems to be, an investigation of the meaning usually attached to the word in acts of parliament passed before that statute.

By the statute of West. 2, (*g*), it is enacted, that where upon the death of any person intestate and indebted, the *goods (bona)* shall come to the ordinary, he shall be bound to pay the debts as far as the *goods (bona)* will extend, in the like manner as executors would have been if he had left a will. And in the 31 Ed. III. c. 11, for the commitment of administration, the word *goods (biens)* only is used.

(*g*) 13 Ed. I. c. 18.

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pass leases for years; and so he said would a grant of *omnia bona* in general; for 39 H. VI. 35, was, that a man had rent for years, and granted *omnia bona sua*; and it was held that this rent passed; and he vouched 4 Hen. IV. as another authority, because an executor shall have an *ejectione firmæ* by the equity of the statute of 4 Ed. III. *de bonis asportatis.*

On examination it appears, that the authorities cited by Gawdy did not apply. The grant was of *omnia bona et catalla, tam viva quam mortua*; and in the statute of 4 Ed. III. the words *biens et chateux* are used.

In

In both these statutes, therefore, the word *goods* was considered as denoting personalty in general. It may indeed be objected, that terms for years were not then much in use; but allowing this, later acts place the point still more out of doubt.

Thus the 21 Hen. VIII. c. 5, after directing how administration shall be granted in certain cases of the "goods" of intestates, contains a direction, that surety shall be taken of the administrators for the administration of the "goods, chattels, and debts," which they should be authorised to minister (*h*).

In this statute the word "goods" was used as synonimous to "goods, chattels, and debts:" and the point seems placed beyond controversy by the same sense being attached to that word in a statute passed but a few years previously to that upon which the present question arises.

The statute to which I allude, is the 22 and 23 Car. II. c. 10, which, after giving power to commit administration of the "goods" of intestates, directs bonds to be taken, with a condition for (amongst other things) making an inventory of the "goods, chattels, and credits" of the deceased; which words are used throughout the condition.

(*h*) And see 43 Eliz. c. 8.

In fact, the words "goods," "goods, chattels, and credits," and "estate," have one and the same meaning attached to them throughout the statute (*i*).

As this point is of very great importance in practice, and the opinion of so great an authority as Serjeant Hill, would perpetually lead to disputes on this subject, it is hoped this minute (and I fear tedious) investigation will not be unacceptable to the learned reader.

It remains to remark, that Lord Hardwicke seems to have considered leaseholds as within the operation of the 16th section of the statute of frauds, and consequently as not bound until the delivery of the writ of execution to the sheriff.

For in Burdon v. Kennedy (*k*), his Lordship said, where an execution by *elegit*, or *fieri facias*, is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown, *and a leasehold estate is also affected from that time*; and if the debtor, subsequent to this, makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment, to

(*i*) And see 29 Car. II. c. 3. s. 25.

(*k*) 3 Atk. 739; and see Jeanes v. Wilkins, 1 Ves. 195.

come

come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment.

By several acts of parliament, all deeds and wills concerning estates within the north (*l*), east (*m*), or west (*n*) ridings of the county of York; or within the town and county of Kingston upon Hull (*o*); or within the county of Middlesex (*p*), are directed to be registered.

And it is enacted, that all such deeds shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee for valuable consideration; unless a memorial thereof be registered in the manner thereby prescribed, before the registering of the memorial of the deed under which such subsequent purchaser, or mortgagee, shall claim.

And that all devises by will shall be adjudged fraudulent and void against subsequent purchasers, or mortgagees; unless a memorial of such will be registered within the space of six months after the death of the devisor, or testatrix, dying within

(*l*) 8 Geo. II. c. 6.
(*m*) 6 Ann, c. 35.
(*n*) 2 and 3 Ann, c. 4.
(*o*) 6 Ann, c. 35.
(*p*) 7 Ann, c. 20.

Great

Great Britain; or within the space of three years after his or her death, dying upon the sea, or in parts beyond the seas: or if the devisee shall be disabled to exhibit a memorial within that time by the suppression of the will, then, unless a memorial be entered of such impediment within two years after the death of such devisor, or testatrix, who shall die within Great Britain, or within four years after the decease of such person who shall die upon the sea, or beyond the seas; and a memorial of such will be also registered within six months after the removal of such impediment.

But it is enacted, that in case of the concealment or suppression of any will, or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within five years after the death of the devisor.

The acts do not extend to copyhold estates, or to leases at rack rents, or not exceeding 21 years, where the actual possession and occupation go along with the lease. And the act for the county of Middlesex, does not extend to any of the chambers in Serjeant's Inn, the Inns of Court, or Chancery.

And it is by the same acts further provided, that no judgment, statute, or recognizance (other than such as shall be entered into in the name and upon the

the proper account of the King, his heirs and successors) shall bind any such estates as aforesaid, but only from the time that a memorial thereof shall be duly entered.

It has been contended, that as upon the execution of a power, the interest limited by it arises under the deed creating the power, a deed of appointment need not be registered; but this construction was overruled (*q*).

It was the intention of the legislature, that the register should contain such information as might enable purchasers to ascertain whether estates were or were not subject to incumbrances; for which purpose it is necessary that the register should contain a regular chain of title: and it hath therefore been decided, that the non-registry of a lease was not cured by registering an assignment in which the lease was recited (*r*).

Three questions on the registry acts respecting notice have arisen, and been decided, namely,

First, Whether a person having the legal estate, as a mortgagee, and advancing more money without notice of a second mortgage duly registered, shall hold against the second mortgagee, till he is

(*q*) Scrafton v. Quincey, 2 Ves. 413.

(*r*) Honeycomb v. Waldron, 2 Str. 1064.

satisfied

satisfied all the money he has advanced? And it hath been adjudged that he shall (*s*).

This decision was made upon this ground: that though the statute avoids deeds not registered, as against purchasers, yet it gives no greater efficacy to deeds that are registered than they had before, and the constant rule of equity is, that if a first mortgagee lends a further sum of money without notice of the second mortgage, his whole money shall be paid in the first place.

Indeed this rule ought to be more inflexible in a register, than in any other county; because by the establishment of the register, the second mortgagee hath the best possible means of discovering whether the estate is incumbered, and who the incumbrancer is; and if he has not searched the register, or, having searched the register, has neglected, in compliance with the general rule of equity, to give the prior incumbrancer notice of the second mortgage, he is not a proper object for the extraordinary protection of a court of equity: for even the rule of law is, *vigilantibus non dormientibus servat lex.*

This principle extends to a mortgagor paying

(*s*) Bedford v. Backhouse, 2 Eq. Ca. Abr. 615, pl. 12; Wrightson v. Hudson, 2 Eq. Ca. Abr. 609, pl. 7.

off

off mortgage money to a mortgagee, without notice of his having transferred the mortgage; which is a valid payment, although the transfer of the mortgage is duly registered (*t*).

And it is conceived the rule would apply to a mortgagee lending a further sum of money to the mortgagor, without notice of the sale of the equity of redemption: and therefore a purchaser of an equity of redemption of an estate, should, immediately after the sale, give notice of it to the mortgagee; although the estate be situate in a register county, and his conveyance be duly registered.

The second question is, whether a person purchasing without notice, and obtaining the legal estate, shall be prejudiced by a prior equitable incumbrance, which was duly registered previously to his purchase? And it was decided by Lord Camden, in the case of Morecock v. Dickens (*u*), that he shall not.

This decision seems hardly reconcilable with the general principles of equity. It is manifest that a purchaser must search the register if he intend to be safe; and it would not, perhaps, be too violent a presumption that every purchaser does

(*t*) Williams v. Sorrell, 4 Ves. Jun. 389.

(*u*) Ambl. 678.

search

search the register, especially when we advert to the very slight circumstances which are deemed constructive notice to a purchaser (*x*). The contrary doctrine evidently leads to perjury, which the statute intended to prevent (*y*).—If upon searching the register, a purchaser should meet with equitable incumbrances only, he might, upon the authority of Lord Camden's decision, purchase the estate, and then deny notice; and there are very few cases in which it could be proved that he actually did search the register.

But the case of Morecock v. Dickens, would not, perhaps, be deemed an authority. Lord Camden seemed to make his decree (in opposition to his own opinion) because much property had been settled, and conveyances had proceeded, on the ground of the determination in Bedford v. Backhouse (*z*). A thousand neglects, he said, had been occasioned by that determination, and therefore he could not take upon himself to alter it. He added, that if it was a new case, he should have had his doubts; but the point was closed by that determination, which had been acquiesced in ever since.

(*x*) See *post*. ch. 16.
(*y*) See Hine v. Dodd, 2 Atk. 275.
(*z*) *Supra*.

Now

Now Lord Camden's decision can only be considered an authority, so far as it is authorised by the case upon which he professed to ground his opinion: and it seems clear, that the case of Bedford v. Backhouse, was not an authority in point; and that the case before his Lordship, was, in every respect, a new question.

In the case of Bedford v. Backhouse, by the known and settled rule of equity, the first mortgagee was entitled to hold against the second mortgagee, unless he had notice; and as the second mortgagee had it in his power to give such notice, and neglected doing so, the decision seems perfectly proper. But in the case before Lord Camden, the prior incumbrancer had no means whatever to acquaint the purchaser with the incumbrance, while he himself had it in his power to ascertain whether the estate was incumbered; and as the neglect was his, the loss occasioned by that neglect, ought to have been borne by him. And it should seem, that no person, *not being seised of the legal estate*, could ever have been induced to neglect searching the register on the authority of any of the cases on this subject, much less on that of Bedford v. Backhouse, which could not, one should think, be so misconstrued, as to sanction or lead to such a neglect.

The

The third and last question is, whether a person buying an estate with notice of a prior incumbrance not registered, shall in equity be bound by such incumbrance, although he hath at law obtained a priority by registering his deeds? And it hath been holden that he shall (*a*).

This decision is perfectly consonant to the general principles of equity. The intention of the act was to secure subsequent purchasers and mortgagees against *prior secret conveyances and fraudulent incumbrances*; and therefore where a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced: for he can be in no danger where he knows of another incumbrance; because he might then have stopped his hand from proceeding, and therefore is not a person whom the statutes meant to relieve (*b*).

It will occur to the learned reader, that although the prior purchaser would, in a case of this nature,

(*a*) Lord Forbes v. Nelson, 2 Eq. Ca. Abr. 482, pl. 19; 3 Atk. 653, cited; Chivall v. Nicholls, Str. 664; Beatniff v Smith, 1 Eq. Ca. Abr. 357, pl. 11; Blades v. Blades, 1 Eq. Ca. Abr. 358, pl. 12; Hine v. Dodd, 2 Atk. 275; Le Neve v. Le Neve, 3 Atk. 646; and Jolland v. Stainbridge, 3 Ves. Jun. 478; and see Cowp. 712.

(*b*) Le Neve v. Le Neve, 3 Atk. 646.

be

be relieved against the subsequent sale, yet the legal estate will be vested in the subsequent purchaser by force of the statute.

From the foregoing decisions, it is evident, that a purchaser may be bound by a deed, although not registered, but it is equally clear, that it must be satisfactorily proved, that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed; and, knowing that, registered, in order to defraud them of that title he knew at the time was in them (*c*). Apparent fraud, or *clear and undoubted notice*, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of parliament (*d*).

By the 11 and 12 W. III. c. 4, Papists were rendered incapable of purchasing lands either in their own names, or in the names of trustees; and all estates made to them were declared to be utterly void and of none effect, to all intents, constructions, and purposes whatsoever.

To remedy the inconveniences arising from this provision, it was by a late statute (*e*) enacted,

(*c*) See 3 Ves. Jun. 485. cited.

(*d*) See 2 Atk. 276; and Irons v. Kidwel, 2 Ves. 69.

(*e*) 3 Geo. I. c. 18.

that no sale for a full and valuable consideration, by a Papist, of any lands, or of any interest therein theretofore made, or thereafter to be made to a Protestant purchaser, should be impeached by reason of any disability of the vendor, or of any person under whom he claimed in consequence of the 11 and 12 W. III. (*f*); unless the person taking advantage of such disability should have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale should have entered his claim at the quarter-sessions, and *bona fide* pursued his remedy. By this act it was provided, that the clauses in 11 and 12 W. III. disabling Papists from purchasing, should remain in full force.

"This proviso is couched in such general words, that it created a doubt in some, whether it did not nearly frustrate the whole effect of the Act. To this it was answered, that notwithstanding the proviso, the enacting part of the statute was in full force for the benefit of a Protestant purchaser; and that the proviso operated only to declare, that Papists themselves should not derive any benefit from the act, in any purchases they should attempt to make, under the foregoing

(*f*) *Vide supra*, p. 292.

clauses.

clauses. This was considered the better opinion, and on the authority of it, many purchases of considerable consequence were made (*g*)."

In an opinion of Mr. Wilbraham's given on this point, in the year 1749, in which he thought the Act of Geo. I. authorised a sale to a Protestant purchaser, and was not in that respect controlled by the proviso, he states, that as the opinion of the eminent conveyancers, from the time of passing the act in 1717, till about the year 1740, had been, that Popish purchasers might sell; and as it was the opinion of the present Chancellor, and several eminent lawyers, they might sell; he was of the same opinion; though the Court of King's Bench seemed to be of a contrary opinion in a trial at bar, in the year 1741, between Fairchild and Newland (*h*).

Here, lastly, may be mentioned the 4th section of the 14 Geo. II. c. 20, for which the profession are indebted to the late Mr. Pigot, whereby, after reciting that by the default or neglect of persons

(*g*) See Mr. Butler's learned note to Co. Litt. 391 a. See also the Act of 43 Geo. III. c. 30, for removing the doubt suggested by Mr. Butler in that note, respecting the oaths to be taken by Roman Catholics.

(*h*) 2 Vol. Cas. and Opin 60; and see several other opinions, *ib.* 54 to 71.

employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights: "It is enacted, that where any person or persons hath, or have purchased, or shall purchase for a valuable consideration, any estate or estates, in lands, tenements, or hereditaments, whereof a recovery or recoveries, is, are, or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her, or them, having been in possession of the purchased estate or estates, from the time of such purchase, shall and may, after the end of 20 years from the time of such purchase, produce in evidence the deed or deeds, making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries, and declaring the uses of a recovery or recoveries, and the deed or deeds so produced (the execution thereof being duly proved) shall in all courts of law and equity be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record

can

can be found of such recovery or recoveries, or the same shall appear not to be regularly entered of record: provided always that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

With respect to the general operation of statutes passed in favour of purchasers, it may be laid down as a rule, that equity will not permit them to be taken advantage of where the purchasers have notice of the incumbrance or deceit which the statutes were extended to guard them against, because *qui scit se decepi non decipitur*, and the resolutions respecting voluntary settlements must be considered anomalous.

Thus have we taken a cursory view of the several statutes passed for the relief or protection of purchasers. The relief and protection afforded to purchasers by the rules of equity, form the next branch of our enquiry.

A court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration, *bona fide, and without notice of any claim on the estate*, such a man is entitled

to the peculiar favour and protection of a court of equity.

And it has been laid down as a general rule, that a purchaser *bona fide*, and for a valuable consideration, without notice of any defect in his title *at the time he made his purchase*, may buy, or get in a statute, mortgage, or any other incumbrance (and that, although it is satisfied); and if he can defend himself at law by any such incumbrance, his adversary shall never be aided in a court of equity for setting aside such incumbrance: for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz. where the court hath refused to give any assistance against a purchaser, either to an heir, or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another (*i*).

And the favour and protection of a court of equity is extended to a purchaser, not only where he has a prior legal estate, but also where he has a better right to call for the legal estate than any other person (*k*).

(*i*) Basset v. Nosworthy, Finch, 102; Jerrard v. Saunders, 2 Ves. Jun. 454; see Anon. 2 Cha. Ca. 208; Hithcox v. Sedgwick, 2 Vern. 156.

(*k*) See 2 Vern. 600; Willoughby v. Willoughby, 1 Term Rep. 763.

A pur-

A purchaser cannot, however, protect himself by taking a conveyance or assignment of a legal estate from a trustee, in whom it was vested upon express trusts (*l*).

Equity will not relieve against a *bona fide* purchaser without notice, although the remedy be gone by accident (*m*); nor will it compel him to discover any writings which may weaken his title (*n*); or take any advantage from him by which he may protect himself at law (*o*), or obtain terms of his antagonist (*p*); neither will equity give any person an advantage over (*q*) a purchaser, or any assistance against him (*r*); and his having taken a collateral security for the title will not make his case worse (*s*), unless the pur-

(*l*) Saunders v. Dehew, 2 Vern. 271.

(*m*) Harvy v. Woodhouse, Sel. Cha. Ca. 80; Bell v. Cundal, Ambl. 101.

(*n*) Hall v. Atkinson, 2 Vern. 463; 1 Eq. Ca. Abr. 333, pl. 54; Millard's case, 2 Freem. 43; Sir John Burlace v. Cook, 2 Freem. 24; Jerrard v. Saunders, 2 Ves. Jun. 454.

(*o*) Nels. Cha. Rep. 9, 34, 35; 2 Cha. Ca. 47, 48; 2 Vern. 599.

(*p*) Walwynn v. Lee, 1 Ves. Jun. N. S. 24.

(*q*) Beckinal v. Arnold, 1 Vern. 354.

(*r*) See Graham v. Graham, 1 Ves. 262.

(*s*) Lowther v. Carleton, Forrest, 187. *Sed vide* White v. Stringer, 1 Lev. 105; Jennings v. Selleck, 1 Vern. 468.

chase by the vendor was fraudulent: in which case it would have considerable weight with a court of equity (*t*).

The rules on this subject have gone so far, that a purchaser *bona fide* for valuable consideration, and without notice, has been allowed to take advantage of a deed which he stole out of a window by means of a ladder (*u*); and of a deed obtained by a third person without consideration, and by fraud (*x*).

Equity will relieve a *bona fide* purchaser without notice, from ancient statutes, if there be no direct proof on either side, and will decree them to be cancelled (*y*).

And this rule extends to mortgages, and all incumbrances which have lain dormant for a long time, and no demand made in respect thereof (*z*).

The mistake or ignorance of any of the parties

(*t*) How v. Weldon, 1 Ves. 517.

(*u*) See a case cited in Sanders v. Deligne, 2 Freem. 123; and see Fagg's case, cited, 1 Vern. 52, and reported in 1 Cha. Rep. 68, where the circumstance of theft does not appear.

(*x*) Harcourt v. Knowel, 2 Vern. 159, cited.

(*y*) Burgh v. Wolf, Toth. 258; Smith v. Rosewell, *ibid.* 277.

(*z*) See Rutter v. Bartley, Toth. 277; Abdy v. Loveday, Finch, 250.

to

to a conveyance of their rights in the estate, will not turn to the prejudice of a *bona fide* purchaser for a valuable consideration (*a*).

If, however, upon a purchase, any person is required to join to obviate an objection to the title, and the objection is stated in such a manner as not to convey full information, the purchaser cannot avail himself of the instrument against the person executing it (*b*).

But if any person having only a general statement that there are objections to a title which his concurrence will obviate, upon that communication executes an instrument and conveys, there is nothing to affect the conscience of the purchaser, so that the person conveying could ever get the estate back. If he does not ask the nature of the objections, he determines against himself as to any question between him and the purchaser, if the deed does not shew that the objections were withheld from him (*c*).

If a person having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person

(*a*) Malden v. Menill, 2 Atk. 8.

(*b*) Lord Braybroke v. Inskep, 8 Ves. Jun. 417.

(*c*) S. C.

who

who has the right (*d*), although covert (*e*), or under age (*f*).

And the same rule prevails even where the representation is made through a mistake, if the person making it might have had notice of the trust (*g*) (26).

But a person having an incumbrance upon an estate, is not bound to give notice of it to any person whom he knows is in treaty for the purchase of the estate (*h*).

If a purchaser take a defective conveyance from the vendor, equity will compel the vendor and his heirs, and all other persons claiming under him by act of law, as assignees of a bankrupt, although without notice, and even persons

(*d*) Hobbs v. Norton, 2 Cha. Ca. 128; Hanning v. Ferrers, 1 Eq. Ca. Abr. 356, pl. 10; and see 2 Freem. 310.

(*e*) Savage v. Foster, 9 Mod. 35; and see Evans v. Bicknell, 6 Ves. Jun. 174.

(*f*) Watts v. Creswell, 9 Vin. 415; 9 Mod. 38; 4 Bro. C. C. 507, n. Clare v. Earl of Bedford, 13 Vin. 536.

(*g*) Pearson v. Morgan, 2 Bro. C. C. 388.*

(*h*) Osborn v. Lea, 9 Mod. 96.

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(26) *Sed qu.* this as a general rule, unless there be *fraud*? See Haycraft v. Creasy, 2 East, 92; Tapp v. Lee, 3 Bos. and Pull. 367.

claiming

claiming as purchasers for valuable consideration, if with notice, to make good the conveyance (*i*).

So, a purchaser by defective conveyance will be relieved against persons who did not consider the land as their original, or primary security; although they may have obtained an advantage at law (*k*).

And if a man sells an estate to which he has *no title*, and after the conveyance acquires the title, he will be compelled to re-convey to the purchaser.

But it seems to have been considered, that this is a personal equity, attaching on the conscience of the party, and not descending with the land; and therefore, that if the vendor do not in his life-time confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract (*l*).

This opinion, however, seems open to much

(*i*) Earl of Oxford's case, 1 Cha. Rep. 10; Sibson v. Fletcher, 1 Cha. Rep. 60; Taylor v. Wheeler, 2 Vern. 564; Morse v. Falkener, 1 Anstr. 11; and see 2 Ves. Jun. 151; 6 Ves. Jun. 745.

(*k*) Burgh v. Francis, Finch, 28; and see Gilb. For. Rom. 228.

(*l*) Morse v. Falkener, 1 Anstr. 11.

observation,

observation, and cannot, it is conceived, be relied on.

It has been said, that every person who takes an assignment of a *chose* in action, gives personal confidence that there is no lien upon it (*m*). Upon the purchase of a *chose* in action, or of any equitable right, it is the invariable practice of the profession, to require notice of the sale to be given to the trustee. This of course binds his conscience. And notwithstanding the general rule, that with respect to equitable rights, *qui prior est tempore potior est jure*, it seems probable that equity would prefer a subsequent purchaser, who had given a proper notice to the trustee, to a prior purchaser, who had neglected to do so. At least there is a case (*n*) which seems, in some measure, to authorise this conclusion.

It may be laid down as a general rule, that a purchaser of a *chose* in action (*o*), or of any equitable title (*p*), must always abide by the case of the person from whom he buys. And yet, as

(*m*) Per Lord Thurlow, *in casu* Davies v. Austen, 1 Ves. Jun. 247.

(*n*) Stanhope v. the Earl of Verney, Butler's n. (1) to Co. Litt. 290 b.

(*o*) Davies v. Austen, *ubi sup.*

(*p*) Whitfield v. Fausset, 1 Ves. 387.

we

we have seen (*q*), there may be cases in which a purchaser, merely by sustaining that character, will be in a better situation than the person was of whom he bought.

Where a purchaser, after the conveyance, or even before the conveyance, in prospect of the articles for sale being carried into execution, hath laid out money in lasting improvements, there are but few cases in which he will not be allowed for them, in case the aid of a court of equity is required to relieve against the purchase (*r*).

And even supposing the court to be unwilling to make an allowance for repairs and improvements, yet if an account of rents and profits is to be taken, and the plaintiff will not accept the account, according to the value of the estate when the purchaser entered, but insists to have the account taken according to the present value, the court will compel him to make an allowance for repairs and improvements (*s*).

(*q*) George v. Milbanke, 1 Ves. Jun. N. S. 190. *Supra*, p. 341.

(*r*) Edlin v. Battaly, 2 Lev. 152; Peterson v. Hickman, 1 Cha. Rep. 5, cited; Wally v. Whaley, 1 Vern. 487; Savage v. Taylor, Forr. 234; *Ex parte* Hughes, 6 Ves. Jun. 617; *Ex parte* James, 8 Ves. Jun. 337; and see 9 Mod. 412.

(*s*) Tomlinson v. Smith, Finch, 378.

If,

If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of it. If a different rule should prevail, it would certainly, as Lord Clare remarked, fully justify a proposition, once stated at the bar of the Court of Chancery in Ireland, that it was a common equity to improve the right owner out of the possession of his estate. However, if the sums be large, it may influence the court in decreeing an account from the time of filing the bill only, and not from the time of taking possession (*t*).

But if the aid of a court of equity is not required, and a person can recover the estate at law, equity, unless there be fraud, cannot, it seems, relieve the purchaser on account of money laid out in repairs and improvements; but will dismiss a bill for that purpose with costs (*u*).

It must be remarked, that where relief is granted, it will only extend to necessary repairs and lasting improvements; and not to money laid out for fancy, or humour (*x*).

(*t*) Kenny v. Browne, 3 Nels. Cha. Rep. 57. Ridgw. P. C. 518.

(*u*) Needler v. Wright,

(*x*) See 1 Vern. 159.

It

It seems, that where two persons claim a reversion, to which only one can be entitled, a bill will lie to perpetuate testimony, although both of them are purchasers, or only one of them is a purchaser (*y*); for such a bill calls for no discovery from the defendant, but merely prays to secure that testimony; which might be had at that time, if the circumstances called for it (27).

Thus have we seen how peculiarly a *bona fide* purchaser without notice is favoured and protected by equity. But if a purchaser has notice of any claim, or incumbrance, his conscience is affected; and a court of equity will then not only refuse to interfere in his favour, but will assist the claimant, or incumbrancer, in establishing his claims against him: his having given a consideration will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntary, and of his own free will (*z*). And it

(*y*) See Lord Dursley v. Fitzhardinge, 6 Ves. Jun. 251.

(*z*) See 3 Atk. 238.

(27) But note, the point was not settled, and it does not seem quite clear what determination it would receive; as retaining such a bill is evidently granting relief against a purchaser.

may

may be laid down as a general rule, that a purchaser with notice, is in equity bound to the same extent, and in the same manner as the person was of whom he purchased (*a*).

A purchaser will be bound even at law, by a parol agreement for a lease not within the statute of frauds, the granting of which constituted part of the consideration, although it be not mentioned in the agreement for purchase, and the rent be not fixed (*b*).

Although a purchaser with notice should, to strengthen his estate, levy a fine, and five years were to pass without a claim, yet the fine and non-claim would be inoperative: for as he purchased with notice, notwithstanding any consideration paid by him, he is but a trustee, and so the estate not being displaced, the fine cannot bar (*c*).

Notice before actual payment of all the money, although it be secured (*d*), and the conveyance

(*a*) Winged v. Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; Jackson's case, Lane, 60; Gore v. Wiglesworth, cited, *ibid.*; Earl Brook v. Bulkeley, 2 Ves. 498; Taylor v. Stibbert, 2 Ves. Jun. 437.

(*b*) Denn v. Cartwright, 4 East, 29.

(*c*) 1 Vern. 149.

(*d*) Tourville v. Nash, 3 P. Wms. 307; Story v. Lord Windsor, 2 Atk. 630; More v. Mayhew, 1 Cha. Ca. 34; 2 Freem. 175, pl. 235.

actually

actually executed (*e*); or before the execution of the conveyance, notwithstanding that the money be paid (*f*), is equivalent to notice before the contract.

But if the conveyance be executed, and the money paid, a purchaser will not be affected by notice of an incumbrance, although a prior incumbrance is not paid off (*g*).

And notice at the time of getting in a precedent incumbrance, as a protection against mesne charges, is not material, so that he had not notice at the time of the purchase (*h*). Indeed, after a conveyance is executed, it is seldom a purchaser thinks of procuring a prior legal estate, unless he discovers some incumbrance on the estate, against which he is anxious to protect himself.

Although a purchaser hath notice of an equitable claim, by which his conscience is affected, yet a person purchasing of him *bona fide*, and without notice of the right, will not be bound by it (*i*).

(*e*) Jones v. Stanley, 2 Eq. Ca. Abr. 685, pl. 9.

(*f*) Wigg v. Wigg, 1 Atk. 384.

(*g*) Meynell v. Garraway, Nels. Cha. Rep. 63.

(*h*) Cockes v. Sherman, 2 Freem. 13.

(*i*) Ferrars v. Cherry, 2 Vern. 384; Mertins v. Joliffe, Ambl. 313; Lowther v. Carleton, MS. Barnard. Rep. Cha. 358; Forrester, 187; 2 Atk. 242.

So, on the other hand, a person with notice of an equitable claim, may safely purchase of a person who bought *bona fide*, and without notice of it (*k*); although this circumstance may influence the court with respect to costs (*l*). This rule is consistent with the others; it is not in favour of the purchaser with notice, but of the purchaser without notice. If a different rule prevailed, he might not be able to sell the estate.

It still remains to show what will be deemed sufficient notice to a purchaser; but the importance of this subject seems to demand a separate chapter.

(*k*) Harrison v. Forth, Prec. Cha. 51; 1 Eq. Ca. Abr. 331, pl. 6; Brandling v. Ord, 1 Atk. 571; Sweet v. Southcote, 2 Bro. C. C. 66; 2 Dick. 671; Lowther v. Carleton, 2 Atk. 242; Andrew v. Wrigley, 4 Bro. C. C. 125; and see Prodgers v. Langham, Sid. 133; 1 Keb. 486; and Gilb. Lex. Pretor. 286, 7.

(*l*) Andrew v. Wrigley, 4 Bro. C. C. 125.

CHAP.

CHAPTER XVI.

OF NOTICE.

NOTICE is either actual, or constructive; but there is no difference between actual and constructive notice in its consequences (*a*).

I. Of actual notice little can be said. It requires no definition, and it need only be remarked, that, to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase. Vague reports from persons not interested in the property, will not affect the purchaser's conscience; nor will he be bound by notice in a previous transaction which he may have forgotten.

That vague reports from strangers are not notice, was decided in the case of Wildgoose v. Wayland (*b*), where one man came to a person about to buy an house, and told him to take heed

(*a*) See Ambl. 626. (*b*) Goulds. 147, pl. 67.

how he bought it, for the vendor had nothing in it, but upon trust for A.; and another person came to him, and told him it was not so, for the vendor was seised of the land absolutely. The information of the first proved correct, yet the purchaser was held not to have notice; because such flying reports were many times fables, and not truth; and if it should be admitted for a sufficient notice, then the inheritance of every man might easily be slandered.

And not only a mere assertion, that some other person claims a title is not sufficient, but, perhaps, a general claim is not sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge (*c*).

However, no person could be advised to accept a title concerning which there were any such reports, or assertions, without having them elucidated; because what one judge might think a flying, vague report, or a mere assertion, another might deem a good notice. For instance, in Fry v. Porter (*d*), Hale, C. B. in speaking of the point of notice in that case (which, however, did not relate to a purchaser), said, "here are several

(*c*) See Jolland v. Stainbridge, 3 Ves. Jun. 478.

(*d*) 1 Mod. 300.

circum-

circumstances that seem to shew there might be notice, and a *public voice in the house*, or an *accidental intimation*, &c. may possibly be sufficient notice."

That the notice to the purchaser must be in the same transaction, seems to have been settled in a case (*e*), upon the statute of charitable uses (*f*), the facts of which were: That land given to charitable uses was intended to be sold by act of parliament; and when the bill was read in parliament, it was declared, that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the house, who spoke in the debate on the bill; yet this notice was held not to be sufficient notice, because it was not known to the purchaser, except as a member of parliament.

It may here be proper to mention, that an action on the case for slander of the vendor's title, will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or to any person

(*e*) See East Greensted's case, *fra*, as to notice to an agent. Duke, 64; and the cases *in-*

(*f*) *Supra*, p. 343.

about to buy the estate; although the sale be thereby prevented (*g*).

Nor will the action lie against the attorney, although he do not deliver the precise message of his principal, provided it be to the same effect.

II. Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the court will not allow even of its being controverted (*h*): but it is difficult to say what will amount to constructive notice. The following rules may, perhaps, assist the learned reader in his researches.

1. Notice to the counsel, attorney, or agent of the purchaser, is notice to him (*i*): for otherwise a man who had a mind to get another's estate, might shut his own eyes, and employ another to treat for him who had notice of a former title; which would be a manifest cheat (*k*). And the same rule prevails, although the counsel, attorney,

(*g*) Hargrave v. Le Breton, 4 Burr. 2422.

(*h*) See 3 Anstr. 438; per Eyre, C. B.

(*i*) Newstead v. Searles, 1 Atk. 265; Le Neve v. Le Neve, 3 Atk. 646, 1 Ves. 64; Brotherton v. Hatt, 2 Vern. 574; Ashley v. Baillie, 2 Ves. 368; Maddox v. Maddox, 1 Ves. 61.

(*k*) Attorney-General v. Gower, 2 Eq. Ca. Abr. 685, pl. 11; per Lord Talbot; see Ambl. 626.

or

or agent, be the vendor (*l*), or be concerned for both vendor and purchaser (*m*).

So, notice to the town agent of the purchaser's attorney in the country, is also notice to the purchaser (*n*).

And if an agent, with notice of any claim, purchase an estate in the name of his principal, without his consent, yet if he afterwards assent to it, he is bound by the notice to his agent (*o*).

Although the counsel, attorney, or agent, be employed only in part, and not throughout the transaction, the purchaser is equally affected by the notice. This was doubted in the case of Vane v. Lord Barnard (*p*); but in the later case of Bury v. Bury, before Lord Hardwicke (*q*), his Lordship said, "where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice."

The notice to the counsel, attorney, or agent,

(*l*) Sheldon v. Drummond, Ambl. 624.

(*m*) Le Neve v. Le Neve, 3 Atk. 646.

(*n*) Norris v. Le Neve, 3 Atk. 26.

(*o*) Merry v. Abney, 1 Cha. Ca. 38; 1 Eq. Ca. Abr. 330; 2 Freem. 131; Nels. Cha. Rep. 59; Jennings v. Moore, 2 Vern. 609; 1 Bro. P. C. 244.

(*p*) Gilb. Eq. Rep. 6; see 1 Pow. Mortg. 488.

(*q*) Chan. 11th July 1748, MS.

must, however, be in the same transaction; as he may very easily have forgotten it (*r*); and if this were not the rule of the court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more liable than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind (*s*).

2. A public act of parliament binds all mankind; but a private act of parliament is not, of itself, notice to a purchaser (*t*). And it is conceived, that an act of parliament, of a private nature, but made a public act, in order that it might be judicially taken notice of, instead of being specially pleaded, and to save the expense of an attested copy, would not be deemed such a public act, as to be, of itself, notice to a purchaser (*u*).

3. *Lis pendens* is, of itself, notice to a purcha-

(*r*) Preston v. Tubbin, 1 Vern. 286; Fitzgerald v. Fauconbridge, Fitzgib. 207; 2 Eq. Ca. Abr. 682, n. (b); Warwick v. Warwick, 3 Atk. 291; Worsley v. Earl of Scarborough, 3 Atk. 392; Steed v. Whitaker, Barnard. Cha. Rep. 220; Hine v. Dodd, 2 Atk. 275; Lowther v. Carleton, 2 Atk. 242; Ashley v. Baillie, 2 Ves. 368.

(*s*) Per Lord Hardwicke, 2 Atk. 242.

(*t*) See 2 Ves. 480.

(*u*) See Hesse v. Stevenson, 3 Bos. and Pull. 565.

ser

ser (*x*), unless it be collusive; in which case it will not bind him (*y*).

But, to affect a purchaser, the *lis pendens* must be in full prosecution (*z*). A *subpœna* served is not a sufficient *lis pendens*, unless a bill be filed (*a*), and brought to a hearing (*b*). And the question must relate to the estate, and not merely to money secured upon it (*c*); but a bill to perpetuate the testimony of witnesses, is a sufficient *lis pendens* (*d*).

A purchaser *pendente lite*, on filing his supplemental bill, goes into the court *pro bono et malo*, and will be liable to all the costs in the proceedings,

(*x*) See Toth. 45; Yeavely v. Yeavely, Toth. 259; 3 Cha. Rep. 25; Culpepper v. Aston, 2 Cha. Ca. 116, 223; Barns v. Canning, 1 Cha. Ca. 301; Snelling v. Squint, 2 Cha. Ca. 47; Sorrel v. Carpenter, 2 P. Wms. 482; and see 3 P. Wms. 117; Garth v. Ward, 2 Atk. 174; 3 Barnard. Rep. Cha. 450; Worsley v. Earl of Scarborough, 3 Atk. 392; Moor v. Moor, Barnard. Rep. Cha. 407; Walker v. Smallwood, Ambl. 676; 5 Co. 47 b; Hill v. Worsley, Hard. 320; Goldson v. Gardiner, 1 Vern. 459, cited.

(*y*) 2 Cha. Ca. 116.

(*z*) Preston v. Tubbin, 1 Vern. 286.

(*a*) Anon. 1 Vern. 318.

(*b*) Garth v. Ward, 2 Atk. 174; 3 Barnard. Rep. Cha. 450.

(*c*) Worsley v. Earl of Scarborough, 3 Atk. 392; 2 Ves. 571.

(*d*) Garth v. Ward, *ubi sup.*

from

from the beginning to the end of the suit (*e*); and he will not be admitted to examine the justice of a former decree, but will be bound by the prior proceedings (*f*).

Relief being sought against a *bona fide* purchaser who bought *pendente lite*, without actual notice, is, however, considered as a hard case in equity; and although the court cannot refuse its aid against him, yet the plaintiff is by no means a favourite; and therefore if he make a slip in his proceedings, the court will not assist him to rectify the mistake (*g*).

4. Decrees of the courts of equity are not of themselves notice to a purchaser (*h*).

This was expressly decided in Worsley v. the Earl of Scarborough (*i*); in which case it appears, by a manuscript note of the late Mr. Coxe's, that Lord Hardwicke held most decidedly, that decrees

(*e*) See 1 Atk. 89.

(*f*) Finch v. Newnham, 2 Vern. 217.

(*g*) Sorrell v. Carpenter, 2 P. Wms. 482.

(*h*) See Toth. 45; Prac. Reg. Cha. 125; and see Sir Thomas Harvey v. Montague, 1 Vern. 57, 122.

(*i*) 3 Atk. 392; and see Rivers v. Steele, Lib. Reg. U. 128; temp. Lord Hardwicke, referred to by Mr. Coxe. Note, owing to the generality of the reference, I could not find this case in the register's book.

were

were not notice. He said, there was no such doctrine that men were to take notice of the decrees of this court, though they were to take notice of a *lis pendens*. In Sorrell v. Carpenter (*k*), it was said by Lord Chancellor King, that the court will oblige all to take notice of its decrees as much as of judgments. This *dictum* is frequently quoted as an authority to prove that the decrees of equity are notice to purchasers; but it was only an *obiter dictum*; and indeed, as judgments are not of themselves notice to a purchaser, it does not appear to affect the question. At first sight the case of Wortley v. Birkhead (*l*), seems to militate against the doctrine, but on examination it will be found not to disturb it; that case having only settled, that after a decree, and direction to settle the priorities of the demands, a puisne incumbrancer cannot take in the first incumbrance, and thereby gain a preference to the second; *as it would lay a foundation for the greatest collusion and contrivance between the parties to exclude each other.*

Decrees, however, which do not put an end to the suit, as decrees to account, are, of themselves, notice to a purchaser (*m*); because the *lites pendentes* are not thereby terminated.

(*k*) 2 P. Wms. 482.
(*l*) 2 Ves. 571.
(*m*) Worsley v. Earl of Scarborough, 3 Atk. 392.

5. The

5. The docquetting of judgments is not, of itself, notice to a purchaser (*n*); for, as Lord Talbot observed, judgments are infinite (*o*).

6. Registration of deeds is not, of itself, notice to a purchaser who was seised of the legal estate at the time of the purchase. In a former part of this work (*p*), some observations are submitted to the learned reader, which tend to show, that a person not being seised of the legal estate at the time of his purchase, is bound by all incumbrances duly registered, although he had not actual notice of them; or, in other words, that in such cases registered deeds are of themselves notice to purchasers.

7. Neither an act of bankruptcy (*q*), nor a commission of bankruptcy (*r*), is notice to a purchaser.

Indeed a decision, that an act of bankruptcy is, of itself, notice to a purchaser, would operate as a

(*n*) Snelling v. Squint, 2 Cha. Ca. 47; Greswold v. Marsham, 2 Cha. Ca. 170; Churchill v. Grove, 1 Cha. Ca. 37; 2 Freem. 176.

(*o*) 2 Eq. Ca. Abr. 682, n. (b).

(*p*) *Vide supra*, p. 365.

(*q*) Wilker v. Bodington, 2 Vern. 599; Collet v. De Gols, Forrester, 65; and see 4 Burr. 2425.

(*r*) Hithcox v. Sedgwick, 2 Vern. 156; reversed in Dom. Proc. See Journals of the House of Lords, vol. xiv. p. 601.

repeal

repeal of the provision in the statute of James, in favour of purchasers from bankrupts. For, as we have already seen, a purchaser, with notice of the act of bankruptcy, cannot take advantage of the statute (*s*).

With respect to a commission of bankruptcy; it was in Hithcox v. Sedgwick, held by Lords Commissioners Trevor and Hutchins, against Lord Commissioner Rawlinson, that a commission of bankruptcy was notice to a purchaser; and that case is considered, by the profession, as having settled that a commission of bankruptcy is, of itself, notice (*t*).

But it appears, that upon appeal to the House of Lords, the decree against Sedgwick was reversed, and the estate ordered to be sold, and Sedgwick to be paid the 2200*l.* (the money advanced after the commission issued), with interest, costs, and charges as mortgagees are usually allowed; which was of course deciding, that a commission of bankruptcy is not, of itself, notice to a purchaser.

(*s*) *Vide supra*, p. 346.

(*t*) See Forrester, 70; 1 Ves. Jun. N. S. 28; 1 Pow. Mortg. 457; 2 Cruise's Digest, 250.

8. What

8. What is sufficient to put a purchaser upon an enquiry, is good notice (*u*); that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it.

This doctrine has been carried so far, that, notice that part of the estate was in possession of a tenant, hath been holden to be notice of a lease, although the purchaser took for granted the tenant was only so from year to year (*x*).

But this of course, as in all other cases on notice, only prevails in equity; for although a purchaser has actual notice of a lease, yet if it be invalid, he may, at law, recover the possession from the lessee (*y*).

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore if a person equitably entitled to an estate, lets it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bona fide*, and without notice of the equitable claim; the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession.

(*u*) Smith v. Low, 1 Atk. 490.

(*x*) See 2 Ves. Jun. 440.

(*y*) Doe v. Lufkin, 4 East, 221.

So

So a purchaser *bona fide*, and without notice, cannot be affected by the mere circumstance of the vendor having been out of possession many years. Thus in a case (z) where A. covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made, and A. 13 years afterwards, surrendered the same lands to B. for valuable consideration, without notice of the covenant, B. was holden to be entitled to the lands, and the covenantees were left to their remedy at law.

In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital, or otherwise, he will be deemed conusant thereof; for it was *crassa negligentia* that he sought not after it (a); and for the same reason, if a purcha-

(z) Oxwith v. Plummer, 3 Bac. Abr. 644; 2 Vern. 636, S. C. From the report in Vernon, it seems that Lord Cowper thought there was no specific agreement to surrender the copyhold to Oxwith; but the report in Bacon is very full and circumstantial.

(a) Biscoe v. Earl of Banbury, 1 Cha. Ca. 287; Moore v. Bennett, 2 Cha. Ca. 246; Ferrars v. Cherry, 2 Vern. 384; Draper's Company v. Yardley, 2 Vern. 662; Mertins v. Joliffe, Ambl. 313; Bury v. Bury, Chancery, 11th July 1748, MS.; and Coppin v. Fernyhough, 2 Bro. C. C. 291.

ser

ser has notice of a deed, he is bound by the whole of its contents (*b*).

But the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration denying actual notice of the fraud (*c*).

Although a term assigned generally in trust to attend the inheritance is equally charged with the inheritance itself, yet such a trust is not of itself notice to a purchaser of any incumbrances. For it is notice of nothing, but that there is an inheritance to be protected, and that the term is attendant. It therefore gives notice to a purchaser of nothing, but what he had notice of by the deeds making out the title to the fee.

But if in an assignment it be declared that the term is assigned to attend the inheritance, *as li-*

(*b*) Tanner v. Florence, 1 Cha. Ca. 259; Taylor v. Stibbert, 2 Ves. Jun. 457; and to this ground, I conceive, the case of Richardson v. Sydenham, 2 Vern. 447, must be referred. *Sed vide* Philips v. Redhel, 2 Vern. 160, cited, where tenant for life sold as tenant in fee, and the very settlement at the time of the purchase was delivered to the purchaser himself; yet the court would not affect the purchaser with the presumptive notice, but dismissed the bill.

(*c*) Kenney v. Browne, 3 Ridged, P. C. 512.

mited

mited or settled by such a deed, or to protect *the uses of such a settlement*, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril (*d*).

9. The better opinion seems to be, that being a witness to the execution of a deed, will not, of itself, be notice; for a witness, in practice, is not privy to the contents of the deed (*e*).

This question has hitherto only occurred between a first mortgagee who witnessed a second mortgage, and the second mortgagee; but it might arise between a purchaser who had, previously to his purchase, attested the execution of a deed relating to the estate, and the person in whose favour the deed was executed.

Lastly, It remains to consider, whether a purchaser is bound to take notice of the mere construction of words, which are uncertain in themselves, and often depend on the locality of them for the interpretation which they may receive.

This question arises where a settlement is made in pursuance of articles, but the estate is, contrary

(*d*) Willoughby v. Willoughby, 1 Term Rep. 763; 1 Collec. Juridica, 337.

(*e*) Moratta v. Murgatroyd, 1 P. Wms 393; Editor's and Cox's notes, *ibid*; Welford v. Beazly, 1 Ves. 6; Beckett v. Cordley, 1 Bro. C. C. 367.

to the intention of the parties, limited, so as to enable the parent to dispose of it. It is clear that the court will rectify the settlement, according to the intention, in favour of the issue, as between themselves, or as between themselves and persons claiming under the parent without consideration; but this has never yet been done against a purchaser (*f*).

In Senhouse v. Earle (*g*), Lord Hardwicke drew a distinction between ancient articles of this sort, and modern ones, and expressed his opinion, that in the case of ancient articles the purchaser should not be disturbed; because modern methods of conveyancing were not to be construed to affect ancient notions of equity; thereby, it should seem, admitting, that a purchaser would be affected in the case of modern articles. But in a later case (*h*) Lord Northington seemed rather of opinion, that no relief should be granted against a purchaser.

Under these circumstances, however, a purchaser cannot be advised to accept a title depending on a settlement made in pursuance of articles, but

(*f*) Warwick v. Warwick, 3 Atk. 291.

(*g*) Ambl. 285.

(*h*) Cordwell v. Mackrill, Ambl. 515; and see Hardy v. Reeves, 4 Ves. Jun. 466; 5 Ves. Jun. 426.

not

not framed according to the general rules of equity; and, certainly, a court of equity would not enforce a purchaser to take such a title; although no relief might be granted to his prejudice if he actually had purchased.

Having endeavoured to shew what will be deemed notice, either actual or constructive, we are now to enquire what will be sufficient proof of such notice.

It seems that the counsel, attorney, or agent of the purchaser cannot be admitted to prove notice.

In Maddox v. Maddox (*i*), the reading of the deposition of the agent of the purchaser, who swore, in proof of notice, that the deeds were laid before counsel, who made objections about the plaintiff's title, was objected to: but Lord Hardwicke said, that though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness; yet if he consents, the court will not refuse the reading his deposition. This objection, he added, had often been made; and though some particular judges had doubted, it was then always over-ruled. And, on investigation, it will, I believe, be found that Lord Hardwicke invariably adhered to this

(*i*) 1 Ves. 62; and see Bishop of Winchester v. Fournier, 2 Ves. 445.

opinion. But it was settled before Lord Hardwicke's time (*k*), and has been the observed rule of the courts ever since (*l*), that counsel and attornies ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose; *and this is the privilege of the client*, not of the counsel or attorney; for it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him.

But an attorney may give evidence of the time of executing a deed, for a thing of such a nature cannot be called the secret of his client; it is a thing he may come to the knowledge of without his client's acquainting him, and is of that nature that an attorney concerned, or any body else, may inform the court of (*m*).

If notice be only proved by one witness, a positive and express denial by the answer will prevent the court decreeing against the answer (*n*): for in

(*k*) Lord Say and Seal's case, 10 Mod. 41.

(*l*) Lindsay v. Talbot, Bull. N. P. 284; Wilson v. Rastall, 4 Term Rep. 753; and see 2 Esp. N. P. 716.

(*m*) Lord Say and Seal's case, 10 Mod. 41.

(*n*) Alam v. Jourden, 1 Vern. 161; 3 Cha. Ca. 123; Kingdome v. Boakes, Prec. Cha. 19; Mortimer v. Orchard, 2 Ves. Jun. 243; and see Evans v. Bicknell, 6 Ves. Jun. 174.

equity,

equity, the general rule is, that if the answer contains a positive denial to the case stated in the bill, and it is contradicted by one witness only, there cannot be a decree against the defendant, unless the circumstances so preponderate, that greater credit, upon the testimonies of both being fairly balanced, must be given to the depositions of the witness, than to the answer of the defendant; laying aside all recollection that the oath of one of the parties is that of an interested person (*o*).

But where it is not a positive denial of the same fact, but admits of a difference, that it is only a denial with respect to himself, whereas in other respects it will equally affect him, there are several cases where the court, on one undoubted witness, would decree against the answer: for instance, a person denying only personal notice, is a negative pregnant, that still there may be notice to his agent, which is a fact equally material (*p*).

And where the answer is not *ad idem*, the charge being positive, and the answer only to belief, which is not sufficient to contradict what is

(*o*) See East India Company v. Donald, 1 Smith's Rep. 213, per Lord Eldon.

(*p*) See 1 Ves. 66, 3 Atk. 650.

 positively

positively sworn, a single witness will be sufficient (*q*).

So where there are a great many concurring circumstances, that strengthen and support the depositions of a single witness, his evidence alone will enable the court to decree against the answer (*r*).

If the evidence is not clear enough to enable the court to make a satisfactory decree, it will be sent to law to be tried (*s*), unless the value of the property will not admit of it (*t*).

But the same rule that would absolutely prevent a decree being made, will restrain the court from directing an issue (*u*); for the matter is only referred to law, to know what a court of equity ought to do (*x*); and sending it to law to be tried, where the jury will certainly find it on the testimony of one witness, and then decreeing it on that verdict, is the

(*q*) See 1 Ves. 97.

(*r*) Walton v. Hobbs, 2 Atk. 19; Only v. Walker, 3 Atk. 407; Pember v. Mathers, 1 Bro. C. C. 52; East I. C. v. Donald, 1 Smith's Rep. 213; and see 6 Ves. Jun. 40.

(*s*) Arnot v. Biscoe, 1 Ves. 95.

(*t*) Jolland v. Stainbridge, 3 Ves. Jun. 478.

(*u*) Pember v. Mathers, 1 Bro. C. C. 52.

(*x*) See 1 Bro. C. C. 53, 54; 1 Smith's Rep. 219.

same

same thing as decreeing on one witness, without trying it at all (*y*).

Formerly, however, an issue used to be directed, although upon the evidence a decree could not be made (*z*), and in such cases the defendant's answer was directed to be read at the trial, not as evidence, for that could not be, nor was it to be admitted to be true, but to be sworn, so that the defendant might have the benefit of his oath at law as well as in equity, if it would have any weight with the jury. But this could only be done where it was merely oath against oath (*a*); and as an issue would not now be directed in such a case, the answer of the defendant cannot, at the present day, be directed to be read at a trial at law. But if a bill is filed for a discovery only, the answer of the defendant may be read on the trial (*b*).

It must be remarked, that if the notice arise, by construction of equity, on a deed which is in the possession of the purchaser (*c*), and he contend that

(*y*) See 1 Eq. Ca. Abr. 229, pl. 13.

(*z*) Ibbotson v. Rhodes, 2 Vern. 554; 1 Eq. Ca. Abr. 229, pl. 13, S. C.; Cant v. Lord Beauclerk, 3 Atk. 408, cited. *Sed vide* Christ College v. Widdrington, 2 Vern. 283.

(*a*) Only v. Walker, 3 Atk. 407.

(*b*) See 1 Smith's Rep. 218.

(*c*) See 1 Ves. 392.

it did not come into his custody till after the completion of his purchase, the proof therefore will lie on him (*d*).

In one case (*e*), however, although the only evidence of the deed being in the possession of the defendant, was the discovery in his answer, and on the deed being produced, the counsel offered to read the answer, to shew that it had not been delivered to him till lately, and long after he had purchased the estate, Lord Hardwicke refused it, though it was argued to be very hard; because the only account of the delivery of the deed was in the answer; and by its not being permitted to be read, the deed must be taken to be in his custody at the time of the purchase, ten years before it actually was.

But it seems, that the defendant had sufficient notice besides the mere custody of the deed. His conveyance recited all the former deeds; and therefore reading the answer, to prove when the deed in question came into his custody, was perfectly unnecessary. And this case, therefore, cannot be deemed subversive of the general rule.

(*d*) See 2 Ves. 486. (*e*) Mertins v. Joliffe Ambl. 311.

CHAPTER XVII.

OF PLEADING A PURCHASE.

"SUPPOSING a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interfere on either side. This is the case where the defendant claims under a purchase for valuable consideration, without notice of the plaintiff's title, which he may plead in bar of the suit (*a*)."

The principle of this plea, Lord Eldon observes, is this; "I have honestly and *bona fide* paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril, in which

(a) Mitford's Treatise, 2d edition, p. 215.

you

you state I have placed myself in the article of purchasing *bona fide* (*b*)."

This plea is a peremptory plea, and must be sworn by the pleader (*c*). It must be put in *ante litem contestatam*, because it is a plea why an answer should not be put in; and, therefore, if a defendant answers to any thing to which he may plead, he over-rules his plea (*d*); but he may answer any thing *in subsidium* of his plea, as he may deny notice in his answer, which he denies also in his plea; because, that is not putting any thing to issue which he should cover by his plea from being put in issue, but it is adding, by way of answer, that which will support his plea, and not an answer to a charge in the bill, which, by the plea, he would decline (*e*).

The plea must state the deeds of purchase, setting forth the dates, parties, and contents briefly, *and the time of their execution* (28), for

(*b*) See Wallwyn v. Lee, 1 Ves. Jun. N. S. 24.

(*c*) Marshall v. Franks, Prec. Cha. 480.

(*d*) Richardson v. Mitchell, Sel. Cha. Ca. 51.

(*e*) Gilb. For. Rom. 58.

(28) Q. this, as the plaintiff might thereby be enabled to proceed against the defendant at law. See Anon. 2 Cha. Ca.

for that is the peremptory matter in bar (*f*) (29).

It must aver that the vendor was seised, or pretended to be seised at the time he executed the conveyance (*g*); for if it be charged in the bill that the vendor was only tenant for life, or tenant in tail, and a discovery of the title be prayed, such a discovery cannot be covered, unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an intail if the vendor was tenant in tail; for if a purchase by lease and release should be set forth, which would pass no more from the tenant in tail than it lawfully may

(*f*) See Gilb. For. Rom. 58; Aston v. Aston, 1 Atk. 302; and 2 Ves. 107, 396; and see Wallwyn v. Lee, 1 Ves. Jun. N. S. 24.

(*g*) Story v. Lord Windsor, 2 Atk. 630; Head v. Egerton, 3 P. Wms. 281; More v. Mayhew, 1 Cha. Ca. 34.

Ca. 161. In Day v. Arundel, Hard. 510, it was expressly held, that the time of the purchase need not be stated in the plea.

(29) It seems, that the practice formerly was, to extend the plea to the discovery even of the purchase-deeds; and in Watkins v. Hatchett, 1 Eq. Ca. Abr. 36, pl. 3, although the purchaser improvidently offered to produce his purchase-deed, yet the court would not bind him to do so.

pass,

pass, and that is only an estate for the life of the tenant in tail (30), then there is no bar against the issue (*h*). Where, however, a fine is pleaded, the plea must aver an *actual* seisin of a freehold in the vendor, and not that he was seised, or pretended to be seised (*i*).

If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance (*k*). And if it be of a particular estate, and not in possession, it must set out how the vendor became entitled to the reversion (*l*). But although a bill be brought by an heir, the

(*h*) Gilb. For. Rom. 57.

(*i*) Story v. Lord Windsor, 2 Atk. 630; and see Page v. Leyer, 2 Ves. Jun, 450.

(*k*) Trevannion v. Moss, 1 Vern. 246; and see 3 P. Wms. 281; 3 Ves. Jun. 226; and 1 Ves. Jun. N. S. 32.

(*l*) Hughes v. Garth, Ambl. 421.

(30) This is the doctrine of Littleton, with which it seems Gilbert agrees; but since Littleton's time it has been held, that the releasee has a base fee determinable by the entry or action of the issue. See Butler's n. (1) to Co. Litt. 331 a. and the authorities there referred to. Sir Edward Coke's excellent commentary on this passage in Littleton (see 3 Rep. 84, b. 85), in which he qualifies it as above, appears to have been overlooked.

plea

plea need not, on that account, aver the purchase to be from the plaintiff's ancestor (*m*).

The plea must also distinctly aver that the consideration money mentioned in the deed, was *bona fide* and truly paid (*n*), independently of the recital of the purchase deed (*o*); for if the money be not paid, the plea will be over-ruled (*p*), as the purchaser is entitled to relief against payment of it (*q*). The particular consideration must, it should seem, be stated (*r*), although this point has been decided otherwise (*s*). There can, however, be no objection to state the consideration, as if it be valuable, the plea will not be invalidated by mere inadequacy (*t*). The question is not, whether the consideration is adequate, but whether it is valuable? for if it be such a consideration as will not be deemed fraudulent within the statute of Elizabeth, or is not

(*m*) Seymour v. Nosworth, 2 Freem. 128; 3 Cha. Rep. 40; Nels. Cha. Rep. 135.

(*n*) More v. Mayhew, 1 Cha. Ca. 34.

(*o*) Maitland v. Wilson, 3 Atk. 814.

(*p*) Hardingham v. Nicholls, 3 Atk. 304.

(*q*) See 2 Ves. 394.

(*r*) Millard's case, 2 Freem. 43; and Snag's case, cited *ibid.*; and see Wagstaff v. Read, 2 Cha. Ca. 156.

(*s*) More v. Mayhew, 1 Cha. Ca. 34; Day v. Arundell, Hard. 510.

(*t*) Basset v. Nosworthy, Finch, 102; Ambl. 767; Mildmay v. Mildmay, Ambl. 767, cited; Bullock v. Sadlier, Ambl. 764.

merely

merely nominal (*u*), or the purchaser is such a one as would hinder a *puisne* purchaser from overturning it, it ought not to be impeached in equity.

The plea must also deny notice of the plaintiff's title, or claim (*x*), previously to the execution of the deeds and payment of the purchase-money (*y*); for till then the transaction is not complete, and therefore if the purchaser have notice previously to that time, he will be bound by it (*z*), And the notice so denied, must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*a*).

The notice must be positively, and not evasively denied (*b*), and must be denied, whether it be or

(*u*) See More v. Mayhew, 1 Cha. Ca. 34; Wagstaff v. Read, 2 Cha. Ca. 156.

(*x*) Lady Bodmin v. Vandebendy, 1 Vern. 179; Anon. 2 Ventr. 361.

(*y*) More v. Mayhew, 1 Cha. Ca. 34; Story v. Lord Windsor, 2 Atk. 630; Attorney-General v. Gower, 2 Eq. Ca. Abr. 685, pl. 11.

(*z*) *Vide supra*, p. 384.

(*a*) Kelsall v. Bennet, 1 Atk. 522. *Sed vide* Brampton v. Barker, 2 Vern. 159, cited, *contra*.

(*b*) Cason v. Round, Prec. Cha. 226; and see 2 Eq. Ca. Abr. 682, n. (b).

be

be not charged by the bill (*c*). If particular instances of notice, or circumstances of fraud are charged, the facts from which they are inferred, must be denied as specially and particularly as charged (*d*).

Notice must also be denied by answer, for that is matter of fraud, and cannot be covered with the plea, because the plaintiff must have an opportunity to except to its sufficiency, if he think fit (*e*); but it must also be denied by the plea, because otherwise there is not a complete plea in court on which the plaintiff may take issue (*f*).

Although a purchaser omit to deny notice by answer, he will be allowed to put in the point of notice by way of answer (*g*), and the omission will not invalidate his plea, if it is denied by that (*h*). If notice is omitted to be denied by the plea, and the *plaintiff reply to it*, the defendant has then only to prove his purchase, and it is not

(*c*) Aston v. Curzon, and Weston v. Berkely, 3 P. Wms. 244, n. (f).

(*d*) Meder v. Birt, Gilb. Eq. Rep. 185; Radford v. Wilson, 3 Atk. 815; and see 2 Ves. 451; and Jerrard v. Saunders, 2 Ves. Jun. 187; 4 Bro. C. C. 322.

(*e*) Anon. 2 Cha. Ca. 161; Price v. Price, 1 Vern. 185.

(*f*) Harris v. Ingledew, 3 P. Wms. 95.

(*g*) Anon 2 Cha. Ca. 161.

(*h*) Coke v. Wilcocks, Mose. 73.

material

material if the plaintiff do prove notice, as he has waved setting down the plea for argument, in which case it would have been over-ruled (*i*). If, however, a bill is exhibited against a purchaser, and he plead his purchase, and the bill is thereupon dismissed, a new bill will lie charging notice, if the point of notice was not charged in the former bill, or examined to; and the former proceedings cannot be pleaded in bar (*k*). But if notice is neither alledged by the bill, nor proved, and the defendant by his answer deny notice, an inquiry will not be granted for the purpose of affecting him with notice (*l*).

The title of a purchaser for valuable consideration without notice, is not a sword to attack the possession of others (*m*); it is a shield to defend the possession of the purchaser (*n*). Whether it will protect his possession from a legal, as well as an equitable title, is perhaps doubtful.

In Burlace v. Cook (*o*), Lord Nottingham held the plea to be good against a legal estate; but in

(*i*) Harris v. Ingledew, 3 P. Wms. 95.
(*k*) Williams v. Williams, 1 Cha. Ca. 252.
(*l*) Hardy v. Reeves, 5 Ves. Jun. 426.
(*m*) Paterson v. Slaughter, Amb. 292.
(*n*) See 3 Ves. Jun. 225.
(*o*) 2 Freem. 24.

the

the subsequent case of Rogers v. Seale (*p*), he is reported to have been of a different opinion, and to have decreed accordingly.

In Parker v. Blythmore (*q*), the Master of the Rolls thought the plea good against a legal estate.

But in Williams v. Lambe (*r*), upon a bill filed by a dowress against a *bona fide* purchaser, without notice of the marriage, Lord Thurlow over-ruled the plea. His Lordship said, the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought where the party is pursuing a *legal title*, as dower is, the plea did not apply, it being only a bar to an *equitable*, not to a *legal* claim.

In a later case (*s*), Lord Rosslyn considered it impossible that Rogers v. Seale, could be the decision of Lord Nottingham, and decreed that the plea could stand against a legal, as well as an equitable title.

Lord Rosslyn did not, however, mention the case of Williams v. Lambe, which is against the doctrine he laid down; nor indeed did he notice the case of Parker v. Blythmore, which is in

(*p*) 2 Freem. 84.

(*q*) 2 Eq. Ca. Abr. 79. pl. 1.

(*r*) 3 Bro. C. C. 264.

(*s*) Jerrard v. Saunders, 2 Ves. Jun. 454.

favour of it. It is much to be lamented that all the authorities were not considered.

To argue from principle, it seems clear that the plea is a protection against a legal as well as equitable claim, and as the authorities in favour of that doctrine certainly preponderate, we may, perhaps, venture to assert, that it will protect against both.

APPEN-

APPENDIX.

No. I.

Notice by the Owner, and his Agent, of the Agent's Intention to bid (*a*).

SIR,

I The undersigned A. of owner of the estates intended to be sold by you at by public auction, on the day of next; do hereby give you notice, that I have appointed the undersigned B. of, &c. to bid on my behalf, or for my use, at the same sale. And I the above-named B. do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said A.

To Mr. Auctioneer.

(*a*) *Vide supra*, p. 13.

No. II.

Notice by the Agent, of his Intention to bid (b).

SIR,

I the undersigned A. of, &c. agent of B. of, &c. owner of the estates intended to be sold by you at , by public auction, on the day of next; do hereby give you notice, that I intend to bid at the same sale, on the behalf, or for the use of the above-named B.

To Mr. Auctioneer.

No. III.

Notice by the Agent, and the Person appointed by him, of such Person's Intention to bid (c).

SIR,

I the undersigned A. of, &c. agent of B. of, &c. owner of the estates intended to be sold by you, at , by public auction, on the day of next; do hereby give you notice, that I have appointed the undersigned C. of, &c. to bid at the same sale, on the behalf, or for the use of the above-named B. And I the said C. do hereby give you notice, that I have accord-

(b) *Vide supra*, p. 13, 14. (c) *Vide supra*, p. 14.

ingly

ingly agreed to bid at such sale, for the use of the said B.

To Mr. Auctioneer.

No. IV.

Conditions of Sale (*d*) (31).

I. That the highest bidder shall be the buyer: and if any dispute arise as to the last or best bidder, the lot in dispute shall be put up at a former bidding.

II. That no person shall advance less at any bidding than £. (32); or retract his or her bidding (*e*).

III. That every purchaser shall immediately pay down a deposit in the proportion of £. for every 100*l.* of his or her purchase-money, into the hands of the *auctioneer* (33); and sign an agreement for

(*d*) *Vide supra*, p. 22.

(*e*) Payne v. Cave, 3 Term Rep. 148. *Vide supra*, p. 25.

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(31) It seems that in conditions of sale the judges will endeavour to collect the meaning of the parties, without incumbering themselves with the technical meaning of the words. See City of London v. Dias, Woodfall's L. and T. 241, cited.

(32) Or thus, "than such sum as shall be named by the auctioneer at the time."

(33) This is scarcely ever done in the country; but the deposits are paid to the agent of the vendor.

payment of the remainder to the proprietor, on the day of next, at ; at which time and place the purchases are to be completed, and the respective purchasers are then to have the actual possession of their respective lots; all outgoings to that time being cleared by the vendor.

IV. That within from the day of the sale, the vendor shall, at his own expense, prepare and deliver an abstract of his title, to each purchaser, or his or her solicitor; and shall deduce a good title (34) to the lots sold.

V. That upon payment of the remainder of the purchase-money at the time above-mentioned, the vendor shall convey the lots to the respective purchasers: each purchaser, at his or her own expense, to prepare the conveyance to him or her; and to tender or leave the same at for execution, by the vendor (*f*).

(*f*) *Vide supra*, p. 25, 99—104.

(34) Where the estate is leasehold, and the vendor cannot produce the lessor's title, this condition should go on thus: "to the lease granted of the premises; but the purchaser shall not be entitled to require, or call for the title of the lessor." *Vide supra*, p. 24, 141—144.

VI. That

VI. That the auction duty of 6*d.* in the pound shall, immediately after the sale, be paid to the auctioneer by the vendor and purchaser, in the proportions following; that is to say, one moiety thereof by the vendor, and the other moiety by the purchaser (*g*).

VII. That if any of the purchasers shall neglect or fail to comply with the above conditions, his or her deposit money shall be actually forfeited to the vendor, who shall be at full liberty to resell the lot or lots bought by him or her, either by public auction, or private contract; and the deficiency (if any) occasioned by such second sale, together with all expenses attending the same, shall, immediately after the same sale, be made good to the vendor by the defaulter at this present sale: and in case of the non-payment of the same, the whole thereof shall be recoverable by the vendor, as and for liquidated damages (*h*).

Lastly, That if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the estate, such mistake or error shall not annul the sale; but a compensation, or equivalent, shall be given or taken, as the case may require.

(*g*) *Vide supra*, p. 26. (*h*) *Vide supra*, p. 25.

Condition to be inserted where the Title-deeds cannot be delivered up (i).

That as the title-deeds which concern this estate relate to other estates of greater value, the vendor shall retain the same in his custody, and enter into the usual covenants (to be prepared by his solicitor, and at his expense) for the production of them to the respective purchasers; but all attested copies which may be required of such deeds, shall be had and made at the expense of the person requiring the same.

Where an estate is intended to be sold in lots, and the title-deeds are to be delivered up, the following condition may be inserted:

That as the aforesaid lots are holden under the same title, the purchaser of the largest of the said lots shall have the custody of the title-deeds, upon his entering into the usual covenants for the production thereof to the purchaser or purchasers of the remaining or other of the said lots: such covenants to be prepared by and at the expense of the person or persons requiring the same; who may have attested copies of such deeds at his, her, or their own expense.

(i) *Vide supra*, p. 24, 223—225.

Where

Where the property is considerable, it may be advisable to make a stipulation as to the expense of the attested copies, according to the value of the lots. As for instance:

That all attested copies of the title-deeds shall be made and delivered at the expense of the person requiring the same, unless his or her purchase-money exceeds £. , but does not amount to £. ; in which case the vendor shall furnish the attested copies of all such deeds and writings as shall be deemed necessary, according to professional usage, at the joint expense of him and the purchaser; and if the purchase-money exceeds £. , the vendor shall furnish the same at his own expense.

No. V.

Agreements to be signed by Vendor and Purchaser after Sales by Auction.

It seems advisable to have two sets of conditions, at the end of one of which may be printed an agreement for the auctioneer, or agent of the vendor, to sign; and at the end of the other, may be printed an agreement for the purchaser to sign. It is not, however, *necessary*, where an estate is sold by auction, for the vendor, or any person on his behalf, to sign an agreement

ment to complete the contract; it being very clear, that the auctioneer is an agent for the vendor; and his setting down in writing the name of the purchaser, price, &c. clearly takes the contract out of the statute.

The agreement for the auctioneer, or agent of the vendor to sign, may be thus:

I do hereby acknowledge, that has been this day declared the purchaser of lot , of the estates mentioned in the above-written particulars, at the sum of £. ; and that he has paid into my hands £. as a deposit, and in part-payment of the said purchase-money; and I do hereby agree, that the vendor shall, in all respects, fulfil, on his part, the above-written conditions of sale. As witness my hand this day of

Purchase-money £.
Deposit-money £.

Remainder unpaid £.
Witness

The purchaser may sign the following agreement:

I do hereby acknowledge, that I have this day purchased by public auction, lot of the estates

estates mentioned in the above-written particulars, for the sum of £. ; and have paid into the hands of the sum of £. , as a deposit and in part-payment of the said purchase-money; and I do hereby agree to pay the remaining sum of £. , unto , at , on or before the day of ; and in all other respects, on my part, to fulfil the above-written conditions of sale. As witness, my hand this day of

Purchase-money, £.
Deposit-money £.

Remainder unpaid £.
Witness

No. VI.

Agreement for Sale of an Estate by Private Contract.

Articles of agreement made and entered into this day of , between A. of, &c. for himself, his heirs, executors, and administrators, of the one part; and B. of, &c. for himself, his heirs, executors, and

and administrators, of the other part, as follow: viz.

The said A. doth hereby agree with the said B. to sell to him the messuages, &c. *(parcels)* with their appurtenances, at or for the price or sum of £. ; and that he the said A. will within one month from the date hereof, at his own expense, make and deliver unto the said B. or his solicitor, an abstract of the title of him the said A. to the said messuages and premises; and will also, at his own expense, deduce a clear title thereto. And also that the said A. or his heirs, and all other necessary parties, shall and will, on or before the day of next, on receiving of and from the said B. his executors or administrators, the said sum of £. , at the costs and charges of him the said B. his heirs, executors, administrators, or assigns, execute a proper conveyance, for conveying and assuring the fee-simple and inheritance of and in all the said messuages and premises, with their appurtenances, unto the said B. his heirs or assigns, free from all incumbrances.

And the said B. hereby agrees with the said A. that he the said B. his heirs, executors, administrators, or assigns, shall and will, on the execution of

of such conveyance as aforesaid, pay the sum of £. unto the said A. his executors or administrators.

And it is hereby further agreed by and between the said A. and B. as follows: viz.

That the conveyance shall be prepared by and at the expense of the said B. and that the same shall be settled and approved of on the parts of the said A. and B. by their respective counsel; and that each of them, the said A. and B. shall pay the fees of his own counsel.

And that all rates, taxes, and outgoings payable for or in respect of the premises to the day of , shall be paid and discharged by the said A. his executors or administrators.

And lastly, that if the said A. shall not deliver an abstract of his title to the said B. or his solicitor, before the expiration of one calendar month from the date hereof, or shall not deduce a good and marketable title to the said messuages and premises, before the said day of then and in either of the said cases, immediately after the expiration of the said one calendar month, or the said day of (as the case may be) this present agreement shall be utterly void to all intents and purposes whatsoever, and the

the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that in the event aforesaid, execution of this agreement shall not be enforced by any court of equity, notwithstanding any rule (if such there be) that time cannot be made of the essence of a contract, or any other rule or maxim whatsoever (*k*). In witness, &c.

A provision may also be inserted in agreements, making time of the essence of the contract, in case the purchase-money is not paid at the day appointed; but clauses making agreements void if a title is not made, or the purchase-money paid by a stated time, should never be inserted unless it be the express intention of the parties. Where time is not deemed material, clauses to the following effect should be inserted:

That the said B. and his heirs shall have, receive, and take the rents and profits of the said messuages and premises, from the day of next, for his and their proper use.

And that if the said conveyance shall not be executed by the necessary parties, and the said

(*k*) *Vide supra*, 197—201.

purchase-

purchase-money paid on or before the said day of then and in such case the said B. his heirs, executors, or administrators, shall from the same day of pay interest for the said purchase-money unto the said A. his executors or administrators, after the rate of £. *per cent. per ann.*

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